Supreme Court, U.S.
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No. __-____

In the Supreme Court of the United States

OCTOBER TERM, 2000

GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA JEAN TYLKA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the defendant, a citizen of Michigan, removed several "consumer fraud" class actions brought in Illinois state courts by citizens of Illinois. Removal rested on diversity of citizenship. Each of the defendant's notices of removal averred that "Plaintiff is an individual who resides in Illinois. Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes." All plaintiffs subsequently admitted their Illinois citizenship, and the district court found as a matter of fact that the parties were diverse.

The plaintiffs moved to remand the suits to state court solely on the ground that their claims did not satisfy the jurisdictional amount. The district court denied the motion, concluding that the claims of at least one of the named plaintiffs satisfied the minimum jurisdictional amount and that the court could exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the claims of the absent class members. After four years of litigation, the district court granted summary judgment to defendant on the merits.

On appeal, the plaintiffs challenged only the district court's conclusion that the named plaintiffs' claims satisfied the "jurisdictional amount" and its assertion of supplemental jurisdiction over the absent class members. On its own motion, however, the Seventh Circuit declared that, although the plaintiffs had subsequently conceded actual diversity of citizenship, the defendant's original notices of removal were defective, because the notices had not pled with particularity the factual basis for the averment that plaintiffs were "citizens of Illinois." The Seventh Circuit vacated the judgment rendered on the merits and directed that the case be remanded to the state court to be re-litigated from scratch.

1. Should this Court resolve a clear conflict among the Circuits and decide whether 28 U.S.C. § 1446(a), which authorizes removal on the basis of a

"short and plain statement of the grounds for removal," nevertheless requires, as the Seventh Circuit held, that a defendant's removal notice must plead with particularity the facts underlying the averment of the plaintiff's diverse citizenship?

2. Does this Court's decision in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), which held that interests of finality and judicial efficiency preclude a court of appeals from vacating a judgment rendered on the merits because of the lack of subject matter jurisdiction at the time of removal, so long as subject matter jurisdiction exists by the time of judgment, prohibit a reviewing court from vacating a judgment rendered on the merits after four years of litigation because of a mere defect in pleading diversity in the original notice of removal?

3. Should the Court resolve a clear conflict among the Circuits, which the Court sought to address last Term in *Free* v. *Abbott Laboratories, Inc.*, 529 U.S. ___ (2000) (affirming by equally divided Court), and decide whether enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367, overturned this Court's ruling in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), and authorizes, in a class action based on diversity of citizenship, the exercise of supplemental jurisdiction over the claims of absent class members whose individual claims would not satisfy the minimum jurisdictional amount?

RULE 14.1 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. Paula J. Tylka
2. Elaine T. Hynek
3. H. Joshua Chaet
4. Cheryl Keller
5. Jeanette Deleon
6. Barbara F. Berg
7. Toni Cainkar
8. Gerber Products Company

RULE 29.6 STATEMENT

Petitioner Gerber Products Company is an indirect wholly owned subsidiary of Novartis Finance Corporation which, in turn, is an indirect wholly owned subsidiary of Novartis, A.G. Novartis A.G.'s shares are publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Gerber Products Company ("Gerber") respectfully petitions, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is published at 211 F.3d 445. App. 1a-7a. Unpublished are the district court's opinion and order denying plaintiffs' Joint Motion to Remand (App. 12a-18a), the opinion and order denying plaintiffs' first motion to reconsider the denial of the motion to remand (App. 19a-22a), the opinion and order denying plaintiffs' second motion to reconsider the denial of the motion to remand (App. 23a-28a), and the opinion and order granting summary judgment on the merits to Gerber (App. 29a-60a).

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2000. Gerber's timely Petition for Rehearing with Suggestion of Rehearing En Banc was denied by order entered on June 8, 2000, and amended on June 14, 2000. App. 8a-11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit denied Gerber's motion to stay the mandate, but on June 30, 2000, Justice Stevens, as Circuit Justice, entered an order staying the mandate pending the filing and disposition of a petition for writ of certiorari. Therefore, the mandate has not issued, and the case remains in the federal courts subject to this Court's review. See *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 466-467 (1947) (28 U.S.C. § 1447(d) does not bar Supreme Court review of court of appeals decision remanding suit to state court even if court of appeals' mandate has already issued); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS. 2D § 3740, at 549 (1998) (same).

STATUTORY PROVISIONS INVOLVED

The relevant statutes and provisions of the Federal Rules of Civil Procedure are set out in the Appendix, *infra*, App. 64a-66a.

INTRODUCTION

This case presents several important and recurring issues about the scope of federal diversity jurisdiction over class actions and the proper procedure for removing such cases from state to federal court. In addressing these questions, the decision below reflects a pattern of actions by the Court of Appeals for the Seventh Circuit departing significantly from relevant statutory commands and from decisions of this Court and other Circuits.

STATEMENT OF THE CASE

1. ***State court complaints***. In early 1996, several Illinois residents, on behalf of themselves and a putative nationwide class, filed suits against Gerber in Illinois state court. Each of the plaintiff class representatives alleged that he or she "resides in Illinois" and purchased Gerber baby products there.

Plaintiffs alleged that Gerber's promotional advertisements about the nutritional value of its baby foods were false and misleading. They alleged that Gerber added water, chemically-modified starch, and sugars to some of its products. Plaintiffs asserted claims of common law fraud and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act, 815 ILCS 505/1 *et seq*. and 510/1 *et seq*, respectively. The complaints sought affirmative and restrictive injunctive relief, actual and punitive damages, and attorneys' fees.

2. ***Removal to federal court and subsequent proceedings.*** Gerber, a corporation with Michigan citizenship, timely removed the actions to the United States District Court

for the Northern District of Illinois on the basis of diversity of citizenship. 28 U.S.C. § 1441. In each of its notices of removal, Gerber averred:

> "According to the allegations of the Complaint, Plaintiff is an individual who resides in Illinois. Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes."[1]

In addition, Gerber alleged that the matter in controversy exceeded $50,000 (the jurisdictional minimum at the time) because the value of the injunctive relief, as well as the punitive damages and attorneys' fees sought by the plaintiffs, greatly exceeded that amount.

After the cases were assigned to the same district judge as related cases, the plaintiffs moved to remand the cases to state court. Significantly, the plaintiffs did not challenge the diversity of citizenship of the parties; rather, they contested solely the satisfaction of the minimum jurisdictional amount.

The district court denied the motion. The court rejected the plaintiffs' argument based on *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), that the claim of each class member had to satisfy the jurisdictional amount. Rather, the court held that, under the "supplemental jurisdiction" statute enacted in 1990, 28 U.S.C. § 1367, "where the claim of one named plaintiff exceeds $50,000, the court may exercise supplemental jurisdiction over the claims of the remaining class members, even though those claims do not separately meet the jurisdictional minimum." App. 15a.

In the court's view, there was no question that the claims of the named plaintiffs satisfied the jurisdictional amount, since one of the complaints had demanded Gerber undertake a

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[1] An illustrative notice of removal is set out *infra* at App. 61a-63a.

nationwide, corrective marketing campaign, the cost of which was "certainly" more than $50,000 and was likely to reach $1 million. App. 17a. On the remaining element of diversity jurisdiction, the court expressly found that the parties' citizenship was "completely diverse." App. 18a. Indeed, plaintiffs never have contended that diversity was lacking.

Plaintiffs moved for reconsideration solely on the jurisdictional amount or, in the alternative, for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied reconsideration but granted the certification. App. 21a-22a. Plaintiffs, however, did not pursue the interlocutory appeal. Instead, they filed a second motion for reconsideration, which, like the first, was denied. App. 28a.

3. ***Litigation and adjudication of the merits.*** After the court denied the reconsideration motions, discovery intensified. In the end, more than thirty fact witnesses (including the named plaintiffs) and eight expert witnesses were deposed, and Gerber alone produced over 30,000 pages of documents.

The district court declined to certify a nationwide class as the plaintiffs sought, but it certified a statewide class composed of all individuals who purchased Gerber baby food in Illinois. The court subsequently ordered that notice be given to all class members, and, after approval of the appropriate form, plaintiffs published the class action notice in various newspapers circulated in Illinois and surrounding states.

After several years of litigation, Gerber moved for summary judgment. With a trial date only months away, the district court granted Gerber's motion, concluding that Gerber's promotional advertising constituted mere "sales patter and puffery" that could not provide the basis for a fraud claim. App. 48a. In addition, the court ruled that the plaintiffs had failed to adduce evidence showing that they had relied on the alleged misrepresentations in choosing to purchase Gerber baby food. App. 54a, 58a-59a.

4. *Decision by the Court of Appeals.* Plaintiffs had elected not to pursue an interlocutory appeal from the district court's order denying their motion to remand (as the district court had authorized). But on appeal from the final judgment, this was the *sole* issue they raised. They did not argue that the district court had reached the wrong result in rejecting the "merits" of their claims. Instead, they challenged only the court's jurisdiction to decide the case. Specifically, they attacked the court's ruling that the 1990 supplemental jurisdiction statute allows a federal court to decide the claims of absent class members whose claims do not individually satisfy the minimum jurisdictional amount, so long as the claims of at least one of the class representatives meet that test.

Plaintiffs did not deny that complete diversity of citizenship existed at all times. Indeed, they expressly conceded to the Seventh Circuit:

> "There is no dispute that the parties are diverse in citizenship." Appellate Brief of the Plaintiffs-Appellants at 6.

In their briefs, therefore, the parties debated only whether 28 U.S.C. § 1367 effectively overruled this Court's decision in *Zahn*, so that not every class member must individually satisfy the minimum jurisdictional amount.

At oral argument, however, Judge Easterbrook began questioning ***plaintiffs'*** counsel about the citizenship of the parties, expressing his concern that "I can't tell that the parties are [of] diverse citizenship." After plaintiffs' counsel reassured Judge Easterbrook that the parties were in fact diverse, Judge Easterbrook continued that it

> "[l]ooks to me like these cases were removed from state court without proper allegations of jurisdiction – without proper allegations of diversity of citizenship."

At that point, plaintiffs' counsel informed the court that "we will, if necessary, cure that if we are able to, which I suspect we will be." Plaintiffs' counsel then turned to his attack on the supplemental jurisdiction issue for the remainder of his argument.

When counsel for Gerber began his oral argument, Judge Easterbrook again raised the issue of diversity of citizenship:

> "JUDGE EASTERBROOK: The first plan ought to be to talk about whether we have diversity of citizenship.
>
> "MR. WILHELM: Yes, your Honor. After removal when the –
>
> "JUDGE EASTERBROOK: The notices of removal Gerber filed are amazing. ***They say well, the complaint alleges that X is a resident of Illinois; therefore, X is a citizen of Illinois. That's just not true. It's a non sequitur.***
>
> "The Supreme Court has – had the district court been alert, these cases would have been remanded in an hour, and that would have been the end because you couldn't have appealed that remand.
>
> "MR. WILHELM: The fact that you raise – that you raise an issue about though has been confirmed in depositions where all of the named Plaintiffs were deposed. All of them testified as to their state of domicile. All of them testified that they were – they were indeed citizens of the state of Illinois.
>
> "JUDGE EASTERBROOK: Well –
>
> "MR. WILHELM: – and there was no issue raised with respect to –

"JUDGE EASTERBROOK: You then may be able to amend the complaints –

"MR. WILHELM: Correct.

"JUDGE EASTERBROOK: – under Section 1653.

"MR. WILHELM: Correct.

"JUDGE EASTERBROOK: And should count your lucky stars because this case should have been remanded instantly because these notices were transparently defective.

"JUDGE COFFEY: All right. Proceed, counsel." (Emphasis added.)

At that point, Gerber's counsel directed his efforts to the supplemental jurisdiction question on which plaintiffs rested their appeal. The oral argument closed with no further discussion about any actual lack of diversity or about any insufficiency in the initial removal notice.

Obviously, Judge Easterbrook's reference to "amending the complaints" posed a possibility that Gerber, as the *defendant*, was in no position to pursue. At no point during the questioning did Judge Easterbrook – or any other member of the panel – direct counsel for Gerber to amend the notices of removal, which Gerber had filed. Moreover, after oral argument, the court of appeals sent no notice to Gerber advising it that, if Gerber did not file an amended notice of removal by a date certain, it risked losing the judgment in its favor on the merits and suffering a remand to the state courts for litigation from scratch.

Two months after oral argument, the court of appeals issued its ruling. The court began by criticizing Gerber for "fail[ing] to take the steps necessary to ensure federal jurisdiction, a surprising failure given this court's direction at oral argument."

App. 3a. Even though the notices of removal expressly alleged that each named plaintiff was

> "a ***citizen*** of Illinois for jurisdictional purposes" (App. 62a (emphasis added)),

the Seventh Circuit's opinion declared that

> "in its notice of removal Gerber referred to the residence of the individual plaintiffs, ***not their citizenship*** as required by 28 U.S.C. § 1332(a)(1)." App. 4a (emphasis added).

The court declared that "the notice of removal was ineffective in terms of properly alleging diversity because allegations of residence *are insufficient to establish diversity jurisdiction.*" App. 5a (emphasis added). This conclusion evidently reflected Judge Easterbrook's opinion, stated during the oral argument, that it is legally insufficient to premise an allegation of diverse *citizenship* on the adverse party's *residence*, as Gerber had done, and that "proper allegations" of diversity require something more. The court never suggested, however, that complete diversity was *actually* not present, either at the time of removal or the time of judgment.

The court then chastised Gerber for its "failure to follow the invitation and direction given to it at oral argument" to file an amended notice of removal pursuant to 28 U.S.C. § 1653. App. 5a. The court declared that it had given Gerber two months to file a corrected notice of removal but that Gerber

> "has neglected to file the necessary documents with the court despite our warning at oral argument that 'we certainly don't have [jurisdiction] on the allegations in this record.'" App. 7a (alteration in the original).

The court peremptorily vacated the district court's judgment on the merits and directed the district court to remand the case to the state court. *Ibid.*

Gerber then filed an amended notice of removal and a timely petition for rehearing with suggestion for rehearing *en banc*. In the petition, Gerber pointed out that there was no question in anybody's mind that complete diversity of citizenship did in fact exist at all times, and the opinion of the court of appeals did not suggest that diversity was lacking. Consequently, the question was not the existence of subject matter jurisdiction but rather the sufficiency of the initial *pleadings* regarding such jurisdiction.

On the pleading issue, Gerber noted that its original notices of removal had expressly alleged that each plaintiff is "a ***citizen*** of Illinois for jurisdictional purposes" (emphasis added). Moreover, Gerber explained that it had not understood Judge Easterbrook's comments at oral argument as a ***direction*** by him personally, much less an order by the panel, to file an amended notice of removal. Consequently, Gerber urged that 28 U.S.C. § 1653 entitled it to file the amended notice of removal before the judgment in its favor – rendered on the merits after four years of litigation – was vacated.

The court of appeals, however, struck the amended notice of removal and denied the petition for rehearing. App. 9a, 11a. Judge Williams, who had originally joined the panel's opinion, voted to grant rehearing. *Ibid.* After the Seventh Circuit denied Gerber's motion for a stay, Justice Stevens, as Circuit Justice, subsequently stayed the issuance of the mandate pending the filing and disposition of this Petition.

REASONS FOR GRANTING THE WRIT

This case poses important questions concerning the pleading standards governing removal petitions and the scope of supplemental jurisdiction over class claims following removal. Each year, defendants seek to remove at least 30,000 cases from state to federal courts. See Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1999, Table S-7. Thus, the issues presented by this Petition directly control a huge number of cases.

I. THE SEVENTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT AND RECURRING ISSUE OF FEDERAL REMOVAL JURISDICTION IN CONFLICT WITH THE CONTROLLING STATUTE AND DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Seventh Circuit's decision does not rest on a finding that subject matter jurisdiction was or is lacking. Indeed, no one disputes that, as the district court found, the parties on each side of this case are of diverse citizenship. Instead, the decision rests on the conclusion that Gerber's original *allegations* regarding the plaintiffs' citizenship were deficient. The court's decision conflicts with the controlling statute and decisions of this Court and other Circuits and is erroneous in three respects, each of which is sufficiently important to warrant review.

First, in assessing the sufficiency of the original notices of removal, the court of appeals applied a heightened pleading requirement, demanding not only that defendants allege the "citizenship" of the plaintiffs but also the factual basis for such allegation. Thus, the panel ruled that the mere averment of the parties' citizenship, even when coupled with the allegation that the adverse parties were "residents" of the diverse state, is "insufficient to establish diversity jurisdiction." App. 5a.

In holding that Gerber had to allege something more in order to "establish diversity jurisdiction" in its notices of removal, the panel opinion relied on Judge Easterbrook's comments during oral argument. As those comments showed, the court concluded that, because Gerber had linked the allegation of "citizenship" to the plaintiffs' own averment of their "residence" and had not alleged any other facts establishing the plaintiffs' "domicile," the notices were insufficient as a matter of law.

That ruling conflicts with 28 U.S.C. § 1446(a), which Congress amended to allow "notice pleading" to suffice in removing cases to federal courts. It also conflicts with Rule 8(a)(1) of the Federal Rules of Civil Procedure, which expressly makes sufficient "a short and plain statement of the grounds upon which the court's jurisdiction depends." Thus, in contrast with Rule 9, Rule 8(a)(1) dispenses with any heightened requirement to plead underlying jurisdictional facts with specificity.

Second, the court of appeals focused exclusively on the notices of removal filed at the beginning of the case in 1996. It did not consider any of the evidence produced in discovery or the memoranda subsequently submitted to the district court, which conclusively established that plaintiffs were *citizens* of Illinois at all times. That refusal violates 28 U.S.C. § 1446(b), which authorizes the court to consider other materials besides the removal notice itself in determining whether a suit is properly removable. The court's decision also disregards Rule 15(b) of the Federal Rules of Civil Procedure, which deems pleadings automatically amended to conform to the evidence presented.

Third, the court of appeals vacated a judgment rendered on the merits after four years of litigation. The decision thus squandered not only the time and money the parties had committed to litigating the case, but also wasted the extensive

effort the federal trial judge invested in supervising and adjudicating it on the merits. That disposition patently conflicts with this Court's decision in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), which held that interests of finality and judicial efficiency preclude a court of appeals from vacating a judgment rendered on the merits because of a defect in the original removal – even an actual jurisdictional defect – so long as subject matter jurisdiction exists by the time of judgment.

Whether viewed individually or collectively, these features of the Seventh Circuit's decision justify further review. Indeed, the Seventh Circuit's decision sets a trap for unwary litigants. Its approach substitutes rigid, formalistic pleading in plain defiance of the "notice pleading" standard built into the Federal Rules and the removal statute itself. And it opens judgments rendered on the merits to attack for pleading irregularities – an outcome with dire ramifications.

A. The Seventh Circuit's Requirement That Parties Plead The Factual Bases Underlying The Allegation Of Diversity Of Citizenship Conflicts With The Governing Statute And Rules And With Decisions Of This Court And Other Circuits.

The Seventh Circuit found wanting Gerber's averment in the notices of removal that:

> "Plaintiff is an individual who resides in Illinois. Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes."

Completely disregarding the latter clause, the court declared that Gerber's removal notices were "ineffective" because "allegations of residence are insufficient to establish diversity jurisdiction." App. 5a.

In ruling that Gerber's removal notices had to allege more facts in order to "establish" diversity jurisdiction, the Seventh Circuit adopted and applied a heightened pleading requirement

for allegations of jurisdiction. Indeed, in light of Gerber's unambiguous averment that "Plaintiff is a citizen of Illinois for jurisdictional purposes," the Seventh Circuit's decision can only be understood on this basis. Further illustrating the Seventh Circuit's approach is the court's subsequent order in *Razdan* v. *General Motors Corp.*, No. 97-2522 (7th Cir. June 22, 2000), in which the Seventh Circuit relied on its decision in this case and found ineffective a removal notice that, like here, expressly alleged the "citizenship" of the parties and relied on the plaintiff's own allegation of his residence as the basis for the averment. The court ordered remand of the case unless GM could allege more specific facts showing the plaintiff's citizenship.

The Seventh Circuit's application of this heightened pleading requirement and its resulting rejection of Gerber's inference of "citizenship" based on "residency" fly in the face of both the removal statute and the Federal Rules.

1. Congress has deliberately repudiated the heightened pleading requirement for removal notices that the Seventh Circuit now has sought to revive. Until 1988, the removal statute required the defendant to file a "verified petition" setting out "the *facts* which entitle him to removal" (emphasis added). In 1988, however, Congress changed those requirements and authorized removal based simply on a "notice" containing a short and plain statement of the "*grounds* for removal." Judicial Improvements and Access to Justice Act, P. L. 100-702, § 1016(b), 102 Stat. 4642, 4669 (1988) (amending 28 U.S.C. § 1446(a)) (emphasis added). Thus, the amendment made clear that it is not necessary to plead "facts" underlying an assertion of diverse citizenship but only the "ground" for federal jurisdiction.

Moreover, as the accompanying legislative history makes clear, Congress intended the change in statutory language to overrule prior judicial decisions – echoed by the Seventh

Circuit here – subjecting removal notices to heightened pleading requirements:

> "The present requirement that the petition of removal state the facts supporting removal has led some courts to require detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds of removal be stated in terms borrowed from the jurisdictional pleading requirement established by civil rule 8(a)." H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 71-72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

Rule 8(a)(1) of the Federal Rules, in turn, requires only "a short and plain statement of the *grounds* upon which the court's jurisdiction depends" (emphasis added). Together, these provisions subject notices of removal to the same "notice pleading" requirements as apply to complaints and other pleadings. See, *e.g.*, *Rachel* v. *Georgia*, 342 F.2d 336, 340 (5th Cir. 1965), aff'd, 384 U.S. 780 (1966).

Indeed, in *Leatherman* v. *Tarrant County NICU*, 507 U.S. 163, 168 (1993), this Court rejected a similar attempt to impose a heightened pleading standard not included within the "two specific instances" authorized by Rule 9(b). The Court noted that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up" by Rule 8(a). *Ibid.* In words equally applicable here, the Court declared that, under the "notice pleading" standard, the pleader need not "set out in detail the facts on which he bases" his allegation." *Ibid.* (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

Thus, correctly understood, the removal statute and Federal Rules make it sufficient to allege that the "ground" for federal jurisdiction is "diversity of citizenship," and there is no

obligation to aver detailed *facts* showing why each party is a "citizen" of a particular state.

2. Under the liberal "notice pleading" rules to which Congress subjected removal notices, there is no doubt that the Seventh Circuit's decision in this case is erroneous and conflicts with decisions of this Court. As early as 1887, this Court ruled that the bare allegation of the parties' "citizenship" – unadorned by any averment regarding the factual basis for the allegations – is sufficient as a matter of federal pleading. *Carson* v. *Dunham*, 121 U.S. 421, 423-424, 427 (1887). Several years later, this Court ruled that a suit was properly removed where the removal petition alleged simply that the petitioner was "a citizen of the states of Virginia and West Virginia only" and the respondent "a citizen of the state of Kentucky." *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 101-102 (1898).

Indeed, this Court has endorsed the very type of allegation employed by Gerber but rejected as a "non sequitur" by the Seventh Circuit. In *Kinney* v. *Columbia Savings & Loan Ass'n*, 191 U.S. 78, 79-80 (1903), the Court affirmed the removal of a case where the defendant, "a resident and a citizen of the city of Denver and state of Colorado," alleged that the plaintiffs were "citizens and residents of the city of Salt Lake and state of Utah." Those averments, of course, are materially indistinguishable from those made here by Gerber.

3. This Court's rejection of a heightened pleading rule for averments of citizenship and its acceptance of bare allegations of each party's "citizenship" make eminent sense. For individuals, "citizenship" is essentially synonymous with "domicile." Domicile is the place where the individual intends to reside indefinitely. *Sun Printing & Publishing Ass'n* v. *Edwards*, 194 U.S. 377, 383 (1904); *Hawes* v. *Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979). As this Court and many Circuits have ruled, federal law presumes that an

individual's residence is also his domicile. See, *e.g.*, *Anderson* v. *Watts*, 138 U.S. 694, 706 (1891) ("The place where a person lives is taken to be his domicile until facts adduced establish the contrary."); see also *Krasnov* v. *Dinan*, 465 F.2d 1298, 1300 (3d Cir. 1972) ("Where one lives is prima facie evidence of domicile * * * *").

Indeed, the Fourteenth Amendment to the U.S. Constitution expressly links a person's residence with his citizenship:

> "All persons born or naturalized in the United States * * * *are citizens* of the United States and *of the State wherein they reside*." U.S. CONST. amend. XIV, § 1 (emphasis added).

Thus, especially where a defendant seeking removal affirmatively supports the bare allegation of an individual's citizenship with an averment of residency, the allegation must be sufficient to establish a *prima facie* case for federal jurisdiction. In the unusual and rare case in which the individual's State of citizenship differs from the State of residence, the burden should properly fall upon the plaintiff to adduce the relevant facts showing that to be the case.

This is particularly true in large, state-court class actions, in which the defendant typically knows nothing about the plaintiff beyond what the plaintiff herself alleges in her complaint. In such actions, an allegation of "residence" is common because state venue provisions often are based upon one of the parties' residence. See, *e.g.*, N.Y. C.P.L.R. § 503(a) (venue lies in county in which one of parties "resided" at time suit was commenced). But since state pleading rules do not require the plaintiff to allege his or her "citizenship," it is utterly unrealistic to demand that the defendant aver *facts* establishing the plaintiff's technical domicile.

It is for this reason that the Seventh Circuit's rule places the defendant in an intolerable quandary. "Domicile" has both an

objective, physical component (residence) and a subjective, mental component (intention to remain there indefinitely). WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS. 2D § 3612, at 526-527 (1984). Requiring the defendant to allege specific facts establishing the plaintiff's "domicile" would necessarily mean that the defendant must either (1) make an allegation regarding the plaintiff's mental state – something the defendant could not possibly know at the outset of litigation – or (2) await discovery regarding the plaintiff's intentions and other indicia of domicile.

The former course is at odds with pleading restrictions imposed by Rule 11(b). The latter course forces the defendant to run the risk of losing the right to remove the suit altogether, since Section 1446(b) requires the defendant to file the removal notice within 30 days following receipt of service of the complaint. Even if state law permits the defendant to pursue discovery immediately upon the service of the complaint, it is quite unrealistic to assume that defendants could complete domicile-related discovery within the 30-day removal period.

4. There is not one whit of evidence that Congress intended to force defendants to navigate between this procedural Scylla and Charybdis of the Seventh Circuit's making. Rather, Section 1446 shows that Congress' intent was just the opposite. Congress set the defendant's time limit for removing a suit at 30 days from service of process. 28 U.S.C. § 1446(b). While requiring prompt filing of a removal notice, Congress dispensed with burdensome pleading requirements and authorized defendants to file a simple "notice" containing only "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). If there is a defect in the allegation of removal jurisdiction, Congress placed the responsibility upon the ***plaintiff*** to bring that defect to the court's attention via a motion to remand to the state court, to be filed within 30 days of removal. 28 U.S.C. § 1447(c). Thus, in that rare case where

the plaintiff's residence is not his domicile, it is the *plaintiff's* burden to raise that fact in a motion to remand the case.

5. The Seventh Circuit's requirement that parties seeking federal court jurisdiction aver more than the "citizenship" of each party also conflicts with decisions from other Circuits. Other Circuits have endorsed the sufficiency of allegations regarding the parties' citizenship that are no more specific than Gerber's here. See, *e.g.*, *Linardos* v. *Fortuna*, 157 F.3d 945, 946 (2d Cir. 1998) ("The complaint alleged that Linardos 'is a citizen of the State of Florida' and that all of the defendants 'are citizens of the State of Connecticut.'"); *Lew* v. *Moss*, 797 F.2d 747, 748 (9th Cir. 1986) (defendants "are now and at all times herein concerned were citizens of the State of California"); *Taylor* v. *Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994) ("Taylor's complaint alleges that he is a citizen of Florida, but does not allege the citizenship of the natural defendants * * * *").

In sum, the Seventh Circuit has imposed a severe and unjustified burden on the defendant's constitutionally-authorized and congressionally-granted right to remove suits based on diversity of citizenship. In *Murphy Brothers, Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), this Court rejected another judicial gloss on the removal process that would have undermined the defendant's right to remove. Similar intervention is necessary to overturn the Seventh Circuit's unrealistic and unwarranted standard for "establishing" diversity at the initial removal stage.

B. The Seventh Circuit's Exclusive Focus On The Allegations In The Original Notices Of Removal Conflicts With Decisions Of This Court And The Other Circuits, As Well As With The Governing Statute And The Federal Rules.

Even if Gerber's allegations regarding the plaintiffs' citizenship were defective, the Seventh Circuit's decision is

erroneous for the additional reason that it focused exclusively on the original notices of removal filed at the outset of the case and entirely ignored the record developed in the ensuing years of litigation. Like its disparagement of Gerber's allegations of citizenship, this aspect of the Seventh Circuit's decision also runs afoul of Congress's intent, this Court's decisions, those of other Circuits, and the Federal Rules.

1. Congress has authorized courts to consider other materials besides the removal notice itself in determining whether a suit is properly removable. Section 1446(a) requires the defendant to attach to the removal notice "all process, pleadings, and orders" served upon the defendant. This additional material is available to support and supplement the "grounds for removal" described in the notice. In addition, Section 1446(b) acknowledges that the removability of the suit may be established through "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Those provisions demonstrate that Congress rejected the Seventh Circuit's single-minded focus on the original notice alone. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS. 2D § 3734, at 370-372 (1998).

2. Moreover, this Court has expressly held that, in assessing whether diversity of citizenship exists, courts should look to the record as a whole, not just the initial pleadings. *Sun Printing & Publishing Ass'n* v. *Edwards*, 194 U.S. 377 (1904). In *Sun Printing*, the Court was confronted with the converse of this suit: the plaintiff filed suit in federal court on the basis of diversity of citizenship, but the complaint alleged only the plaintiff's "residence" and not his "citizenship." This Court declared that, while the bare allegation of "residence" was insufficient to demonstrate diversity of citizenship, the record as a whole established the requisite diversity of citizenship:

> "The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient." *Id.* at 382.

Likewise, in *Willingham* v. *Morgan*, 395 U.S. 402, 407-408 & n.3 (1969), this Court considered affidavits attached to the subsequently filed motion for summary judgment to establish that the suit was properly removed to federal court.[2] Of course, the Seventh Circuit's approach cannot be squared with these decisions.

3. In addition, the Seventh Circuit's exclusive focus on the removal notices conflicts with the decisions of virtually every other Circuit, which expressly endorse the consideration of post-removal submissions in evaluating the removability of the suit. See, *e.g.*, *District of Columbia ex rel. American Combustion, Inc.* v. *Transamerica Ins. Co.*, 797 F.2d 1041, 1044 (D.C. Cir. 1986); *John Birch Soc'y* v. *NBC*, 377 F.2d 194, 199 (2d Cir. 1967); *Allen* v. *R & H Oil Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995); *Barclay Square Properties* v. *Midwest Fed.*

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[2] In fact, this Court has declared that it is not even necessary to allege the citizenship of the parties, so long as the record otherwise establishes their citizenship. *National Steamship Co.* v. *Tugman*, 106 U.S. (16 Otto) 118, 122 (1882) ("It is not always necessary that the citizenship of the parties be set out in the petition for removal. The requirements of the law are met if the citizenship of the parties to the controversy sought to be removed is shown, affirmatively, by the record of the case."); see also *Bondurant* v. *Watson*, 103 U.S. (13 Otto) 281, 286 (1880) ("Whether the petition [for removal] avers the fact or not is immaterial, provided the fact is shown to exist by any part of the record.").

Savings & Loan Ass'n, 893 F.2d 968, 969 (8th Cir. 1990); *Singer* v. *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997); *Penteco Corp. Ltd. Partnership* v. *Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991); *Sierminski* v. *Transouth Financial Corp.*, 216 F.3d 945, 949 (11th Cir. 2000).

4. Here, the Seventh Circuit disregarded not only the district court's express finding that diversity of citizenship exists (App. 18a), but the record materials establishing plaintiffs' Illinois citizenship. To begin with, plaintiffs themselves conceded that the parties are of diverse citizenship. Appellate Brief of the Plaintiffs-Appellants at 6; Memorandum of Plaintiff De Leon in Support of Motion to Remand at 1-2. That concession is sufficient to establish their citizenship, particularly in light of the fact that the plaintiffs vigorously contested the removal of this action on the distinct question of jurisdictional amount. Therefore, there was no reason to suspect that they misrepresented their citizenship in order to manufacture federal jurisdiction collusively.

In addition, the Seventh Circuit overlooked substantial evidence of the plaintiffs' Illinois citizenship produced during discovery in this suit. Deposition testimony and interrogatory answers by the plaintiffs confirmed that each resided and worked in Illinois at the time she commenced her lawsuit. Compare *Gutierrez* v. *Fox*, 141 F.3d 425, 428-429 (2d Cir. 1998) (plaintiff is New Jersey citizen since he resides in New Jersey, even though he works and banks in New York); *Abbott* v. *United Venture Capital, Inc.*, 718 F.Supp. 823 (D. Nev. 1988) (plaintiff is California citizen since he resides in California, even though he worked and banked in Nevada). Indeed, several of the plaintiffs were born in Illinois and, evidently, had never lived outside the State. That evidence – particularly in light of the absence of any controverting evidence – is conclusive of the existence of the complete diversity of citizenship between the plaintiffs and Gerber.

5. Finally, the Seventh Circuit's one-dimensional focus on the original notices of removal, disregarding everything that subsequently emerged to confirm diversity, also frustrated Rule 15(b). That Rule requires federal courts to focus ultimately on the facts and issues litigated, not the original, formal pleadings. It provides that pleadings are deemed amended "to conform to the evidence" presented in litigating the merits. Fed.R.Civ.P. 15(b). This sensible principle of federal procedure applies with full force to alleged insufficiencies in removal notices, when the actual course of the litigation effectively fills in any blanks. See *Realty Holding Co.* v. *Donaldson*, 268 U.S. 398, 400 (1925) ("It was, however, conceded by appellee in the court below, as well as here, that she was in fact a citizen of Michigan; and the court below assumed the point. Since the defect may be cured by amendment and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made and dispose of the case.").

In sum, the Seventh Circuit's exclusive focus on the allegations of citizenship in the notices of removal filed at the outset of this litigation four years ago flies in the face of the relevant statute and Rule, as well as the decisions of both this Court and other Circuits. Moreover, that focus led the Seventh Circuit to reach a result utterly at odds with the facts as established by the record. The Seventh Circuit's erroneous approach to these issues warrants plenary review or summary reversal.

C. The Seventh Circuit's *Sua Sponte* Decision To Vacate A Judgment Rendered On The Merits After Four Years Of Litigation Conflicts With This Court's Decision In *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996).

The Seventh Circuit's decision also warrants review because it defies a recent, unanimous precedent in which this Court expressly forbade such action.

1. Just four Terms ago, in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), this Court repudiated the notion that a court of appeals may properly vacate a judgment rendered on the merits because of a defect in the initial removal of the case from state court. In that case, the Court confronted the issue whether the appellate court could vacate a judgment rendered on the merits, because subject matter jurisdiction *actually* had been lacking when the suit was removed. At the time of removal, the case had included non-diverse parties on opposite sides, but the non-diverse party dropped out of the case before entry of the final judgment.

The Court explained that, when the case came before the court of appeals, the question was not truly one of "subject-matter jurisdiction" – as Judge Easterbrook erroneously termed it during the oral argument below – since diversity jurisdiction was unquestionably present by the time final judgment was entered. Rather, the issue was whether some severe "remedy" had to be imposed for the defendant's failure to comply with the statutory mandate that the case be fit for removal at the time the removal petition was filed. 519 U.S. at 73.

So framed, the issue was not a close one in this Court's view. The Court unanimously held that the appellate court lacked authority to vacate a judgment rendered on the merits, even if there was no subject-matter jurisdiction at the time of removal, so long as jurisdiction existed by the time judgment was rendered. The Court explained:

> "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." 519 U.S. at 75.

Moreover, this Court further observed that principles of federalism counseled against, not in favor of, vacating the federal court judgment:

> "To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77.

2. This Court's decision in *Caterpillar* demonstrates beyond doubt that the Seventh Circuit exceeded its lawful authority when it wiped out the judgment in Gerber's favor here. The same interests that preclude an appellate court from vacating judgments rendered on the merits because of the lack of subject matter jurisdiction at the time of removal also preclude, *a fortiori*, vacating such judgments because of a mere pleading defect in the original notice of removal. In both situations, "considerations of finality, efficiency, and economy become overwhelming." The Seventh Circuit's defiance of this Court's unanimous ruling in *Caterpillar* is so patent that summary reversal is in order.

3. Not surprisingly, the Seventh Circuit's decision in this case also conflicts with the decisions of other Circuits. Following *Caterpillar*, the other Circuits have steadfastly refused to vacate judgments rendered on the merits, including summary judgments, because of defects in the original notice of removal. See, *e.g.*, *Kocher* v. *Dow Chemical Co.*, 132 F.3d 1225, 1230 (8th Cir. 1997) (affirming judgment despite defendant's failure to include all claims in the notice of removal); *Parrino* v. *FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998) (affirming judgment despite defendant's failure to join all defendants in removal notice initially).

4. Moreover, the Seventh Circuit's decision in this case is even less defensible than the Sixth Circuit's order reversed in *Caterpillar*. Congress expressly provided in 28 U.S.C. § 1653 that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." This statute was

enacted for the purpose of avoiding disputes regarding the sufficiency of pleadings after significant resources have been invested in litigating the merits of a case. Thus, if jurisdiction actually exists, as it does here, defective *allegations* about jurisdictional predicates can be corrected at any time, even on appeal or on review by this Court. See *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830-31 (1989); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9 (1975); *Realty Holding Co.* v. *Donaldson*, 268 U.S. 398, 400 (1925). This statute is further proof of the manifest error of the Seventh Circuit's judgment-busting rule.

It is no answer to say (as the Seventh Circuit held) that Gerber had the opportunity to exercise the right afforded it by Section 1653 and that Gerber waived it. The plaintiffs had never challenged the sufficiency of Gerber's allegations of diversity. The first time that the issue was raised was at oral argument before the court of appeals, and, even then, only one judge of the panel mentioned the matter. After oral argument, the court never issued a formal notice to Gerber, such as a "show cause" order, that its removal notices were defective and that the case would be returned to state court unless Gerber took corrective action within a stated time. Compare *Chemical Leaman Tank Lines, Inc.* v. *Aetna Cas. & Surety Co.*, 177 F.3d 210, 222 n.13 (3d Cir. 1999) (instructing plaintiff to file amended complaint to remedy defective jurisdictional allegation).

Indeed, in contrast to the Seventh Circuit's action here, the other Circuits typically issue a written order instructing the party to file an amended pleading and specifying the time within which the party must file the pleading. See, *e.g.*, *Brooks* v. *Yawkey*, 200 F.2d 663, 664 (1st Cir. 1953) (instructing party to file amended complaint within 10 days of order); *Kaufman* v. *Western Union Telegraph Co.*, 224 F.2d 723, 725 (5th Cir. 1955) (10 days); *Texaco-Cities Service Pipe Line Co.* v. *Aetna Cas. & Surety Co.*, 283 F.2d 144, 145 (8th Cir. 1960) (20 days);

Fry v. *Layne-Western Co.*, 282 F.2d 97, 99 (8th Cir. 1960) (30 days); *Whitelock* v. *Leatherman*, 460 F.2d 507, 515 (10th Cir. 1972) (20 days).

Moreover, once Gerber did receive such notice – in the form of the panel's decision vacating the judgment – Gerber promptly filed an amended notice of removal (along with its petition for rehearing). Under the circumstances, the Seventh Circuit was duty-bound to accept and give effect to that filing. See *Howard* v. *Cordova*, 177 U.S. 609, 614 (1900) (failure to allege defendant's citizenship in removal petition "was curable by amendment, and it was not only within the power, but the duty, of the court, on its attention being called to the fact, to have allowed such an amendment to be made").

Thus, this case dramatically illustrates the wasteful disrespect for final judgments that this Court condemned in *Caterpillar* and that Congress sought to avoid in enacting Section 1653. Over a four-year period, the parties expended countless hours conducting discovery and litigating the merits of the plaintiffs' claims. That time and effort resulted in a judgment rendered on the merits of those claims. The blow to our dual court system created by the Seventh Circuit's decision is two-fold: the work of the federal court is squandered, while the state court is left to litigate a case from scratch. No greater waste of the time and resources of both court systems could be imagined. And for what – a pleading defect that no party raised and that, at best, can be characterized as only a formalistic oversight. Nothing in "our Federalism" even remotely sanctions, much less compels, such needlessly duplicative efforts.

D. The Seventh Circuit's Decision Threatens To Set A Trap For Unwary Litigants.

There is another practical factor calling for review of the Seventh Circuit's decision. It sets a trap for the unwary and threatens to turn the process of establishing federal jurisdiction

into a sport. Until this decision, plaintiffs and defendants alike could reliably assume that a bare but affirmative allegation of an individual's citizenship was sufficient to lay the predicate for the assertion of federal jurisdiction by virtue of the diversity of citizenship. According to the Seventh Circuit, however, those complaints and removal notices are fatally defective. Some litigants will have the "defect" called to their attention and will amend their pleadings pursuant to Section 1653; others who find themselves, like Gerber, in more rigid courtrooms will suffer dismissal or remand. Either scenario entails needless cost and waste.

This is not idle speculation. Shortly after the decision against Gerber, the Seventh Circuit followed its decision in this case and ruled that the notice of removal in *Razdan* v. *General Motors Corp.*, No. 97-2522 (7th Cir. June 22, 2000), was similarly defective. Although GM's removal notice alleged the "citizenship" of the parties, the plaintiff's state court complaint had alleged only his residence. The court gave GM 10 days in which to amend the notice of removal to plead more specific facts showing the plaintiff's citizenship or face a remand to the state courts. There is no telling how many more Gerbers and GMs await the Seventh Circuit's pleading axe.

This is not litigation as Congress, the Federal Rules and this Court understand it. Rather, it is formalistic sport that wastes the time, money, and effort of all involved. Indeed, it is the action of a Circuit with a peculiar, anachronistic, and misguided fixation – as demonstrated by the fact that no other Circuit has adopted such a rigid and severe approach to removal pleadings as has the Seventh.

II. THIS COURT SHOULD RESOLVE WHETHER ENACTMENT OF 28 U.S.C. § 1367 OVERRULED THE COURT'S HOLDING IN *ZAHN* v. *INTERNATIONAL PAPER CO.*, 414 U.S. 291 (1973), AND PERMITS THE EXERCISE OF SUPPLEMENTAL JURISDICTION OVER THE CLAIMS OF ABSENT CLASS MEMBERS WHOSE INDIVIDUAL CLAIMS DO NOT SATISFY THE MINIMUM JURISDICTIONAL AMOUNT.

Last term, in *Free* v. *Abbott Laboratories, Inc.*, No. 99-391, this Court undertook to decide whether Congress, in enacting 28 U.S.C. § 1367, overruled *Zahn* and authorized the district courts, in adjudicating class actions based on diversity of citizenship, to consider the claims of absent class members that individually do not satisfy the jurisdictional minimum amount set by 28 U.S.C. § 1332. The Court did not resolve that question and instead split 4-4. See 529 U.S. ___ (2000) (affirming by equally divided Court).

1. For the same reasons that led this Court to grant certiorari in *Free*, this Court should grant certiorari in this case. The Circuits remain divided whether 28 U.S.C. § 1367 extends the federal courts' subject-matter jurisdiction to claims of absent claims members that individually do not satisfy the jurisdictional minimum. Compare *In re Abbott Laboratories*, 51 F.3d 524, 528-529 (5th Cir. 1995) (Section 1367 overrules *Zahn*; supplemental jurisdiction exists for class members so long as one plaintiff's claim satisfies jurisdictional minimum), and *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 930-931 (7th Cir. 1996) (same), with *Meritcare Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 218-222 (3d Cir. 1999) (Section 1367 does not overrule *Zahn*; claim of each class member must satisfy jurisdictional minimum), and *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631, 641 (10th Cir. 1998) (same).

In fact, since this Court's 4-4 affirmance in *Free*, other courts have acknowledged the continuing conflict among the Circuits (see *Mehlenbacher* v. *Akzo Nobel Salt, Inc.*, 216 F.3d 291, 297 (2d Cir. 2000)), and the lower courts have continued to grapple with the issue with divergent results (see WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS. 2D § 3523.1, at 132-134 & nn. 65, 74 (Supp. 2000) (collecting cases)). Moreover, the issue remains important, since it affects a significant number of large class actions filed in state courts. Of special concern are those cases, like the present one, in which class representatives seek to press thousands of separate claims that may not each satisfy the minimum jurisdictional amount individually but that, in total, add up to potentially staggering sums.

2. This is a particularly good case in which to resolve the circuit split. In this case, the existence of subject-matter jurisdiction turns exclusively on the question the Court sought to decide in *Free* – the impact of 28 U.S.C. § 1367 on *Zahn*. The district court's assertion of subject-matter jurisdiction to decide the merits rested upon its conclusion that Congress intended to overrule *Zahn* and that Section 1367 authorized it to exercise supplemental jurisdiction over the entire class, so long as the claims of one plaintiff exceeded the jurisdictional minimum amount. Indeed, the principal issue raised on appeal was Section 1367's applicability to a class action in which one of the named plaintiffs has sought injunctive relief costing more than the jurisdictional minimum amount.

Although the court of appeals did not expressly address the supplemental jurisdiction issue, the alternate ground on which it rested – the alleged defect in initially pleading diversity of citizenship – was plainly wrong, for the reasons discussed above. There is no reason to remand the case to the Seventh Circuit to address the sole remaining issue – the use of the supplemental jurisdiction statute to supersede *Zahn* – because that court has already expressed itself on this legal issue. In

Stromberg, the Seventh Circuit decided that Section 1367 does overrule *Zahn*. 77 F.3d at 931.

Therefore, the important issue the Court was unable to decide last term in *Free* is ripe, and this case squarely frames the question.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for briefing and argument. In the alternative, certiorari should be granted and the judgment of the Seventh Circuit reversed summarily in light of this Court's decision in *Caterpillar* and other controlling cases.

Respectfully submitted.

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SEPTEMBER 2000

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2893

PAMELA J. TYLKA, H. JOSHUA CHAET,
CHERYL KELLER, et al.,

Plaintiffs-Appellants,

v.

GERBER PRODUCTS COMPANY,
a Michigan Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 96 C 1647, 96 C 1648, 96 C 1649
and 96 C 1964 — Charles B. Norgle, Sr., *Judge*.

ARGUED FEBRUARY 22, 2000 — DECIDED MAY 1, 2000

Before COFFEY, EASTERBROOK and WILLIAMS, *Circuit Judges*.

COFFEY, *Circuit Judge*. In February and March of 1996, Pamela Jean Tylka, H. Joshua Chaet, Cheryl Keller, Jeanette DeLeon, Toni Cainkar, Elaine T. Hyneck, and Barbara F. Berg filed almost identical class-action lawsuits against Gerber Products in the Circuit Court of Cook County, Illinois. In their complaints, the plaintiffs alleged that Gerber engaged in a pattern of false and deceptive advertising concerning the nutritional value and content of its baby food products, in

violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stats. 505/1, the Uniform Deceptive Trade Practices Act, 815 Ill. Comp Stats. 51% and Illinois common law fraud. Pursuant to 28 U.S.C. § 1446,[1] Gerber removed these cases to the United States District Court fo the Northern District of Illinois, alleging that diversity jurisdiction existed.

Obviously unhappy with their lawsuits being removed to federal court, the plaintiffs moved to remand their cases back to the state court system, arguing that the amount in controversy requirement of 28 U.S.C.§ 1332 ($50,000 at the time the suit was filed)[2] was not met. The district court judge denied that plaintiffs' motion for a remand to the state courts because, according to the court, the injunctive relief sought by at least one plaintiff would cost Gerber more than $50,000, and

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[1] 28 U.S.C. § 1446(a) provides:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United Sates for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plaint statement of the grounds for removal, together with a copy of all process, pleadings, and order served upon such defendant or defendants in such action.

[2] 28 U.S.C. § 1332(a)(1) (1995) (emphasis added) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –
>
> (1) *citizens* of difference States . . . .

therefore diversity jurisdiction existed.[3] Subsequently, the judge entered summary judgment in favor of Gerber. Plaintiffs appeal the trial court's determination of subject matter jurisdiction; that is, the judge's conclusion that the requirements for diversity jurisdiction were met. Because Gerber has failed to take the steps necessary to ensure federal jurisdiction, a surprising failure given this court's direction at oral argument, we VACATE the district court's opinion and REMAND this case with instructions to REMAND these lawsuits back to Illinois state court.

Because the basis for the resolution of this appeal lies in Gerber's failure to perfect subject matter jurisdiction as directed by the court, only the facts relevant to that issue will be addressed in this opinion and we will leave it up to the Illinois courts to determine the precise nature of the plaintiffs' claims.

In February and March 1996, seven plaintiffs filed six virtually identical lawsuits against Gerber in the Circuit Court of Cook County, Illinois,[4] in which they claimed that Gerber's advertising describing its baby food products as nutritious and of high quality was false and misleading. All six complaints sought compensatory damages, punitive damages, injunctive relief, and attorney's fees. But, as mentioned earlier, the complaint filed by Tylka and the one jointly filed by Chaet and Keller requested, in addition to the relief sought by the other plaintiffs, that Gerber "run corrective marketing, publicity, and advertising for an appropriate period of time."

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[3] Two of the complaints (the one filed by Tylka and the one jointly filed by Chaet and Keller) requested that Gerber "run corrective marketing, publicity, and advertising for an appropriate period of time." The trial judge was of the opinion that such an advertising campaign would easily cost Gerber over $50,000. Because this appeal is resolved on other grounds, we need not address this issue.

[4] Chaet and Keller jointly filed one lawsuit.

Gerber removed the actions to federal court in the Northern District of Illinois. *See* 28 U.S.C. § 1441(a).[5] However, in its notice of removal Gerber referred to the *residence* of the individual plaintiffs, not their *citizenship* as required by 28 U.S.C. § 1332(a)(1). Despite this obvious shortcoming, none of the parties brought this to the trial judge's attention and the cases were allowed to proceed in federal court.

Instead of focusing on the obvious deficiency of Gerber's notice of removal, the parties (and the district court) directed their attention to the question of whether the jurisdictional minimum for diversity jurisdiction was satisfied. Given that determinations as to the exact nature of the plaintiffs' claims are now better left out he sound discretion of the Illinois state courts, it is enough to say that the judge was of the opinion that the demand for corrective advertising made by three of the named plaintiffs satisfied the jurisdictional minimum of $50,000 and thus the court had subject matter jurisdiction. The trial judge then granted summary judgment in favor of Gerber.

We review the propriety of the removal of a state action to federal court de novo, *see Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997) (citing *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994)), keeping in mind that federal courts are always "obliged to inquire *sua sponte*

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[5] 28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes or removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (emphasis added) (citations omitted).

We begin with the well-known rule that removal is proper over any action that court have been filed original in federal court. *See* 28 U.S.C. § 1441; *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972). Here, Gerber removed the case on diversity grounds, and as the party seeking to invoke federal diversity jurisdiction, Gerber bears the burden of demonstrating that the complete diversity and amount in controversy requirements were met at the time of removal. *See In re County Collector*, 96 F.3d 890, 895 (7th Cir. 1996); *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995). As stated before, the parties have ignored the fact that the notice of removal was ineffective in terms of properly alleging diversity because allegations of residence are insufficient to establish diversity jurisdiction. *See Guaranty National Title Co. v. J.E.G. Associates*, 101 F.3d 57, 58 (7th Cir. 1996) (It is well-settled that "[w]hen the parties allege residence but not citizenship, the court must dismiss the suit."); *see also Steigleder v. McQuesten*, 198 U.S. 141 (1905); *Denny v. Pironi*, 141 U.S. 121 (1891); *Robertson v. Cease*, 97 U.S. 646 (1878).

While it is surprising that a counsel would fail to follow the simple step of alleging citizenship, what is even more surprising is Gerber's counsel's failure to follow the invitation and direction given to it at oral argument.

At oral argument, this court advised the parties that "28 U.S.C. § 1653 permits the allegations of jurisdiction to be amended even in the Court of Appeals . . . But until that happens we certainly don't have [jurisdiction] on the allegations in this record."[6] After Gerber assure the court that there was

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[6] Under section 1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

diversity of citizenship, counsel was informed that: "You may then be able to amend the complaints under section 1653, and should count your lucky starts because this case should have been remanded instantly."

Surprisingly to say the least, Gerber has yet to file a section 1653 amendment of pleadings addressing the jurisdictional problem despite the fact that this court has given Gerber approximately two months to do so.

On a number of occasions we have dismissed actions where litigants fail to make section 1653 amendments to correct deficient allegations of diversity of citizenship after being instructed to do so. For example, during oral argument in *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 982 F.2d 1072, 1073 (7th Cir. 1992), as in this case, "the court reminded the parties of the need to establish complete diversity of citizen." But "[d]espite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends." *Id.* at 1074. Consequently, we vacated the district court's judgment on the merits and remanded with instructions to dismiss for lack of subject matter jurisdiction. *See id.*; *see also Guaranty,* 101 F.3d at 59; *see, e.g., Held v. Held,* 137 F.3d 998, 1000 (7th Cir. 1998); *Dausch v. Ryske,* 9 F.3d 1244, 1245 (7th Cir. 1993); *Chicago Stadium Corp. v. State of Indiana,* 220 F.2d 797, 799 (7th Cir. 1955).

As we have stated in the past,

> These lawyers knew what they had to do, and they did not do it. Failure in one round of supplemental filings leads us to doubt that a second would be any more successful. Anyway, it is not the court's obligation to lead counsel through a jurisdictional paint-by-numbers scheme. Litigants who call on the resources of a federal court must establish that the tribunal has jurisdiction, and when after multiple opportunities they do not demonstrate that jurisdiction is present, the appropriate

> response is clear. Counsel have only themselves to blame if they must now litigate this case from scratch in state court.

Guaranty, 101 F.3d at 59.

Gerber, in this case, has neglected to file the necessary documents with the court despite our warning at oral argument that "we certainly don't have [jurisdiction] on the allegations in this record." Consequently, the judgment of the district court is VACATED, and this case is REMANDED to the district court with instructions to REMAND the plaintiffs' lawsuits back to the Illinois state court system.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, IL 60604

June 8, 2000

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

PAMELA J. TYLKA, H. JOSHUA CHAET, CHERL KELLER, et al.,	)	Appeal from the Northern District of Illinois, Eastern Division
Plaintiffs-Appellants,	)	
No. 99-2893	)	Nos. 96 C 1647 96 C 1648
v.	)	96 C 1649
GERBER PRODUCTS COMPANY, a Michigan Corporation,	)	Charles R. Norgle, Sr. *Judge*
Defendant-Appellee.	)	

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause on May 12, 2000 by the Appellee, no judge in active service has

requested a vote thereon, and* a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

---

* Judge Ann Claire Williams voted to grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, IL 60604

June 14, 2000

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

PAMELA J. TYLKA, H. JOSHUA CHAET, CHERYL KELLER, et al.,	)	Appeal from the United States
	)	District Court for
Plaintiffs-Appellants,	)	the Northern
	)	District of Illinois
No. 99-2893	)	Eastern Division
	)	
v.	)	Nos. 96 C 1647, 96 C 1648 & 96 C 1649
	)	
GERBER PRODUCTS COMPANY, a Michigan Corporation,	)	
	)	Charles R. Norgle, Sr.
	)	*Judge*
Defendant-Appellee.	)	

AMENDED ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause on May 12, 2000 by the Appellee, no judge in active service has

requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

---

* Judge Ann Claire Williams voted to grant the petition for rehearing; Judge Joel M. Flaum did not participate in the consideration for rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAULA TYLKA, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 96 C 1647
GERBER PRODUCTS COMPANY, a Michigan corporation,	)	Hon. Charles R. Norgle
Defendant.	)	
ELAINE T. HYNEK, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	No. 96 C 1648
v.	)	
GERBER PRODUCTS COMPANY, a Michigan corporation,	)	
Defendant.	)	
H. JOSHUA CHAET and CHERYL KELLER, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 96 C 1649
v.	)	
GERBER PRODUCTS COMPANY, a Michigan corporation,	)	

Defendant.	)	
BARBARA F. BERG, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	No. 96 C 1964
v.	)	
GERBER PRODUCTS COMPANY, a Michigan corporation,	)	
Defendant.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is Plaintiffs' Joint Motion to Remand. For the following reasons, the motion is denied.

I. Background

Plaintiffs, all Illinois residents, filed four separate putative class actions in the Circuit Court of Cook County, Illinois. Plaintiffs sued Defendant Gerber Products Company ("Gerber"), a Michigan corporation, for violations of Illinois' consumer fraud statute. They seek damages and injunctive relief for Gerber's allegedly false statements regarding the nutritional value of its first-year baby food. At least one Plaintiff seeks injunctive relief which directs Gerber "to run corrective marketing, publicity, and advertising for an appropriate period of time." (Tylka Compl. at 20.)

Gerber removed the cases based on diversity jurisdiction and all four cases have been assigned to this court based on

relatedness.[1] Plaintiffs now seek to remand the cases, claiming that, although the parties are diverse, the amount in controversy could not possibly meet the $50,000 minimum of 28 U.S.C. § 1332. Defendants counter that the injunctive, punitive, and attorney fee relief requested raises the value of Plaintiffs' case well beyond the jurisdictional minimum and that removal is therefore appropriate.

II. Discussion

Federal courts are of limited jurisdiction. Removal from a state court to a federal court is appropriate only where the court would have original jurisdiction over a suit. 28 U.S.C. § 1441(b); Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993). The court must determine jurisdiction for removal purposes as of the time of removal, without taking post-removal pleadings into account. Matter of Shell Oil Co., 966 F.2d 1130 (7th Cir. 1992) and 970 F.2d 355 (7th Cir. 1992) (per curiam). Courts must read the removal statute narrowly and presume that plaintiffs' choice of forum is proper and valid. Id. Courts should resolve doubts about jurisdiction in favor of the states. Id. The party seeking removal bears the burden of establishing federal jurisdiction by a preponderance of the evidence. Shaw v. Dow Brands, Inc., 994 F.2d 364 n.2 (7th Cir. 1994).

The parties' dispute turns on whether the amount in controversy exceeds the jurisdictional minimum; if it does, the court has original diversity jurisdiction and removal is appropriate. Removal is proper only where the requisite amount in controversy is manifest from a reasonable reading of the Complaint. Navarro v. Subaru of Am. Ops. Corp., 802 F. Supp. 191, 193 (N.D. Ill. 1992).

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[1] The parties have treated these cases as one putative class action for purposes of this motion; the court will do so as well.

In computing the amount in controversy, the court cannot aggregate the damages claims of Plaintiffs' and putative class members. Anthony v. Security Pac. Fin. Servs., Inc., 75 F.3d 311, 315-16 (7th Cir. 1996). "[T]here is no room for argument, as a matter of either logic or precedent, that . . . the amount in controversy . . . is to be determined on any basis other than what is in dispute between those name litigants (and not between some absent plaintiff class member and the targeted defendant)." In re Amino Acid Lysine Antitrust Litig., 918 F.Supp. 1181, 1188 (N.D. Ill. 1996) (rejecting arguments in favor of aggregating costs of class members' injunctive relief).

However, where claims are closing related, it is no longer the rule that the claim of each plaintiff must exceed the jurisdictional minimum. Rather, where the claim of one named plaintiff exceeds $50,000, the court may exercise supplemental jurisdictional over the claims of the remaining class members, even though those claims do not separately meet the jurisdictional minimum. See Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996). The parties do not dispute that the claims in the instant case are closely related.[2]

Therefore, the court looks to the claims of the individual named Plaintiffs to determine if any meet the minimum jurisdictional amount. Neither party contends that the requisite amount in controversy is apparent from the damages prayers of any of the Complaints. Even if Plaintiffs fed their babies nothing but Gerber baby food, no matter how voracious the cherubs, it is highly unlikely that any of them would have purchased $50,000 worth of baby food. Gerber does not dispute this.

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[2] The court notes that, by attempting to bring a class action, Plaintiffs represent that the claims are closely related.

The questions then becomes whether the court may consider the other types of relief claimed by the individual Plaintiffs: injunctive relief, attorney fees, and punitive damages. The court will first address the issue of injunctive relief. Gerber requests that the court consider the cost of injunctive relief in its calculation of the amount in controversy. Plaintiffs object.

Generally, in an action for equitable relief, courts measure the amount in controversy by the value of the right sought to be enforced. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995). To calculate the value of that right, courts may consider the cost of enforcing it. See, e.g., McCarty v. Amoco Pipeline Co., 595 F.2d 389 (7th Cir. 1979).

However, Plaintiffs argue that the court should not apply this rule in the instant case. Plaintiffs cite to recent opinions involving the case of In re Amino Acid Lysine Antitrust Litigation. The Amino Acid court, also sitting in the Northern District of Illinois, refused to consider the costs of injunctive relief when calculating the amount in controversy. See In re Amino Acid Lysine Antitrust Litigation, No. 95 C 7679 (MDL 1083, 96 C 2699) 196 WL 238825, at *3 (N.S. Ill., May 7, 1996) and 918 F. Supp. 1181, 1188 (N.D. Ill. 1996).

However Amino Acid is unlike the instant case in at least three ways. First, the Amino Acid court appears to have been asked to aggregate the costs of the requested injunctive relief for each class member; Gerber has made it clear that it does not request aggregation of injunctive costs. See Amino Acid, 918 F. Supp. at 1188. Second, the Amino Acid court found that the plaintiff's claim for injunctive relief was merely "tacked on" to the primary claim for damages. Id. In the case sub judice, at least one named Plaintiff has asked for corrective injunctive relief, which would involve far more than the simple "cease and desist" order apparently sought in Amino Acid. See Id. at 1187 (quoting plaintiffs as requesting that "each defendant be enjoined from continuing the illegal conspiracy

alleged herein.") In the instant case, the court finds that Plaintiffs' claims for damages, based on false baby food advertising, pale in the face of the claim for extensive corrective marketing, advertising, and publicity. As such, the court finds that Plaintiff's claims for injunctive relief are not merely "tacked on" to their claims for damages. Indeed, given the scope of the requested injunction, it may be viewed as the primary relief sought. Third, the Amino Acid court found, apparently without dispute from the parties, that none of the named plaintiffs could ever independently meet the jurisdictional minimum - with or without injunctive relief. See Amino Acid, 1996 WL at *2. Here, Defendants assert that at least one named Plaintiff has requested relief valued at more than $50,000. For all of these reasons, unlike the Amino Acid court, this court finds it appropriate to consider the costs of injunctive relief in calculating the amount in controversy.

Still, the parties disagree about the costs of the requested injunctive relief. In support of its argument that the corrective relief would cost most than $50,000, Gerber submits the affidavit of its Vice President and General Manager - Baby Food. The affidavit states that the requested corrective injunctive relief would cost the company in excess of $1 million. Without support, Plaintiffs assert that the cost of such relief is "far from certain." Although the court agrees that the amount is not "certain," in this particular case, it finds that the corrective relief requested would cost more than $50,000. Gerber is a large multinational corporation. In at least one of the Complaints, Plaintiffs state that Gerber controls approximately 70% of the annual $1.25 billion baby food industry. An effective correction of an allegedly false advertising in such a large industry would certainly cost more than $50,000.

Thus, at the time of the removal, at least one named Plaintiff sought injunctive relief in excess of $50,000. As such,

because the parties are also completely diverse, the court would have original jurisdiction under 28 U.S.C. § 1332.[3]

III. Conclusion

Accordingly, removal was proper. The court denies Plaintiff's Joint Motion for Remand.

IT IS SO ORDERED.

ENTER:

/s/ Charles R. Norgle, Sr.
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 6-14-96

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[3] The parties do dispute whether the court may aggregate the putative class members' punitive damages and attorney fees requests. However, the court need not address these issues because, as discussed above it finds that the amount in controversy for at least one class member to be above the jurisdictional minimum.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAULA TYLKA, individually and on behalf of all others similarly situated, Plaintiff, v. GERBER PRODUCTS COMPANY, a Michigan corporation, Defendant.	)	No. 96 C 1647 Hon. Charles R. Norgle
ELAINE T. HYNEK, individually and on behalf of all others similarly situated, Plaintiff, v. GERBER PRODUCTS COMPANY, a Michigan corporation, Defendant.	)	No. 96 C 1648
H. JOSHUA CHAET and CHERYL KELLER, individually and on behalf of all others similarly situated, Plaintiffs, v. GERBER PRODUCTS COMPANY, a Michigan corporation,	)	No. 96 C 1649

Defendant.	)	
BARBARA F. BERG, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	No. 96 C 1964
v.	)	
GERBER PRODUCTS COMPANY, a Michigan corporation,	)	
Defendant.	)	

ORDER

Before the court is Plaintiffs' motion for reconsideration or, in the alternative for certification for interlocutory appeal. For the following reasons, the motion for reconsideration is denied and the motion for certification is granted

A motion for reconsideration is proper where a court has patently misunderstood a party, has made a decision beyond the issue presented by the parties to the court, or has made an error of apprehension rather than reasoning. Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 18185, 1191 (7th Cir. 1990). Such a motion may also be granted where there has been a significant change in the law or facts since the submission of the original issue to the court. Id. Motions which simply reassert previously-rejected arguments do not justify reconsideration and are improper. City of Chicago v. Reliable Truck Parts Co., 828 F. Supp. 40 (N.D. Ill. 1993). Although Plaintiffs state that the court misapprehended their original motion to remand, the court finds to the contrary and that the instant motion simply repeats Plaintiffs' previous arguments. In addition, contrary to Plaintiffs' assertion, there has been no significant change in relevant case law.

Plaintiffs contend that, by applying the rule of Stromberg Metal Works, Inc. v. Press Mach., Inc., 77 F.3d 926 (7th Cir. 1996), the court ignored the United States Supreme Court's mandate against aggregation of damage claims in Zahn v. International Paper Co., 414 U.S. 291 (1973). As the court already noted, Stromberg's rule does not run contrary to Zahn. Following Stromberg, the court did not aggregate the damage claims of several class members. Rather, the court recognized that at least one plaintiff requested more than $50,000 worth of injunctive relief.[1] Thus, that Plaintiff's case was properly before the court pursuant to its diversity jurisdiction, and, following Stromberg, the court elected to retain jurisdiction over the remaining Plaintiff's closely-related claims. The court's ruling was also consistent with McCarty v. Amoco Pipeline Co., 595 F.2d 389 (7th Cir. 1979), which allows the court to consider the value of injunctive relief from a defendant's perspective.

The court finds that the recent cases cited by Plaintiffs do not specifically address the issue at hand. For example, in Estrella v. Boots Co., PLC, No. 96 C 3291, 1996 WL 490721 (N.D. Ill. Aug. 22, 1996), the named plaintiff in a putative class action requested that the court award injunctive relief in the form of a corrective notice to all class members. The Estrella court refused to attribute the entire cost of such corrective notice to the named plaintiff, as all class members would benefit from the requested relief. In the instant case, the requested injunctive relief, corrective advertising, would not be

---

[1] Regarding Plaintiffs' notation that Gerber has removed the starch and sugar from its products, thus negating the need for some of the requested injunctive relief, the court reiterates that it determines jurisdiction for removal purposes as of the time of removal, without taking post-removal pleadings into account. Matter of Shell Oil Co., 966 F.2d 1130 (7th Cir. 1992) and 970 F.2d 355 (7th Cir. 1992) (per curiam).

aimed only at other members of the putative class: Plaintiffs do no contend that they are all still buying baby food. Rather, the requested relief would benefit current and future baby food buyers, most of whom are not members of the putative class. Respectfully, the court declines to apply the rule of Estrella to the instant case, where the beneficiaries fo the requested injunctive relief are, for the most part, not other class members. The court notes that the other cases from this district cited by Plaintiffs were decided before Stromberg. Additionally, the two Gerber cases to which Plaintiffs cited are from other jurisdictions which have not adopted the rules of Stromberg and McCarty. Thus, Plaintiffs have demonstrated no significant change in relevant case law since the court's original ruling.

However, the court does find controlling the issue of which the jurisdictional amount has been satisfied, and finds that "there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination" of the instant case. See U.S.C. § 1292(b). Thus, the court grants certification for interlocutory appeal.

/s/ Charles Norgle
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: January 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAMELA JEAN TYLKA, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 96 C 1647
GERBER PRODUCTS CO., a Michigan corporation,	)	Honorable Charles R. Norgle
Defendant.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is Plaintiffs' Motion for Reconsideration of Motion to Remand for Lack of Jurisdiction. For the following reasons, Plaintiffs' motion is denied.

I. BACKGROUND

The facts relevant to the disposition of the instant motion were previously reported in Tylka v. Gerber Prods. Co., 1996 WL 341441 (N.S. Ill. June 18, 1996) ("Tylka I").[1] Since the court published its original opinion denying Plaintiffs' motion to remand, the United States Court of Appeals for the Seventh Circuit issued In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 (7th Cir. 1997). Plaintiffs

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[1] Because the facts involving remand were discussed exhaustively in Tylka I and have not changed since it issued, the court will not repeat them here.

now claim that in light of the Seventh Circuit's recent ruling, "the court's previous decision [denying the motion to remand] is inconsistent with Brand-Name . . ."

II. DISCUSSION

As a preliminary matter, the court notes that "all federal courts retain power to reconsider (issues) if they wish." United States v. Shannon, 94 F.3d 1065, 1076 (7th Cir. 1996). Further, district courts have "the discretion to make a different determination of any matters that have not been taken to judgment or determined on appeal. Pre-judgment orders . . . are interlocutory and may be reconsidered at any time." Cameo Convalescent Ctr., Inc. v Percy, 800 F.2d 108, 109 (7th Cir. 1986). Although the law of the case doctrine generally discourages revisiting prior decisions, one well-established exception is a change in the law. Law v. Medco Research, Inc., 113 F.3d 781, 783 (7th Cir. 1997).

Here, Plaintiffs assert that the Seventh Circuit's recent pronouncements in Brand Name clarify the rules governing aggregation of injunctive relief costs in class action suits. As a result, Plaintiffs contend that Tylka I now runs afoul of the prohibition against aggregation and must be brought into conformity. Before the court reaches the substance of Plaintiffs' claim, a brief review of the Brand Name decision is warranted.

Brand Name involved a price-fixing scheme, whereby drug manufacturers conspired to sell their goods at special discounted rates to favored customers. The unfavored customers brought a class action suit against the manufacturers, seeking, among other forms of relief, an injunction barring further price-fixing. Although the case was originally filed in state court, the defendants removed the matter to federal court. When the plaintiffs moved for remand, the defendants argued that the case was properly in federal court because the cost of

complying with the injunction exceeded the jurisdictional amount. 123 F.3d at 602, 607. The Seventh Circuit disagreed.

The Court began its analysis by reaffirming the "either viewpoint" approach. That is, courts may assess either the value of the injunction to the plaintiff or the cost of compliance to the defendant. If either amount exceeds the threshold, then, assuming diversity exists, jurisdiction is proper pursuant to 28 U.S.C. § 1332. However, whether the court adopts the value or cost perspective approach "each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint." Brand Name, 123 F.3d at 610. With this principle in mind, the Court found that each plaintiff's claim for injunctive relief "would be unlikely to impose a heavy cost on any of the defendants." Further, the Court refused to aggregate the plaintiffs' claims because each plaintiff was "asserting an individual right" (the right to be free from collusive pricing), rather than "a right to an undivided interest in something." Id. at 610. The Court concluded its analysis with the following statement: "The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated." Id.

Plaintiffs seize upon this last statement and argue that "[b]ecause this Court's June 18, 1996 ruling necessarily aggregated the cost of injunctive relief to the entire putative class--the cost of corrective notification to a single plaintiff would, undoubtably, cost far less than $50,000.00--it is inconsistent with Brand Name." Not only is this assertion belied by the express findings in Tylka I, but Brand Name is distinguishable.

In the penultimate paragraph of its opinion, the court stated: "Thus, at the time of removal at least one named Plaintiff sought injunctive relief in excess of $50,000.00" Tylka I, at *3 (emphasis added). This statement makes clear

that no aggregation occurred. Furthermore, the nature of the injunctive relief sought, corrective advertising, is no divisible in such a way that its cost or value can be quantified as to each plaintiff. Stein v. Sprint Communications Co., 968 F. Supp. 371, 377-78 (N.D. Ill. 1997); Loizon v. SMH Societe Suisse De Microelectronics, Et Horologerie SA, 950 F.Supp. 250, 253-54 (N.D. Ill. 1996). While a defendant may attempt to use the cost of corrective advertising as a pretext for removal, a concern expressed by the Brand Name court in ober dicta, see Brand Name, 123 F.3d at 610, it is important to note that it was the Plaintiffs who originally demanded "corrective marketing, publicity, and advertising." Plaintiffs now will not be heard to complaint that the injunctive relief sought should only cost Defendant enough to preclude federal jurisdiction.

Further, Brand Name involved multiple defendants, all of who had separate and distinct costs of compliance. Because the Court was able to reasonably estimate each defendant's injunctive costs as to each plaintiff, it determined that no single plaintiff could satisfy the jurisdictional amount. Brand Name, 123 F.3d at 609-10. Here, however, there is a single defendant being required to bear the brunt of a single injunction. Under these circumstances, and given the nature of the global relief requested, the court can no divide, apportion, nor aggregate the Defendant's injunctive costs among the Plaintiffs.

Finally, to the extent Plaintiffs argue that no single plaintiff in this class action suit has standing to require such global relief, the court rejects such an assertion. "To meet the standing requirements of Article III, '[a] plaintiff must allege [a] personal injury . . . likely to be redressed by the requested relief.'" Raines v. Byrd, __ U.S. __, __, 117 S. Ct. 2312, 2317 (1997). Here, Plaintiffs do not argue that the injunctive relief would not, at least in part, address Plaintiffs' alleged injuries. Indeed, the parties only dispute how the injunction should be carried out. However, even if injunctive relief requests present "knotty workability problems" they are still redressable.

Jorman v. Veterans Administration, 579 F. Supp. 1407, (N.D. Ill. 1984), citing, Linda R.S. v. Richard D., 410 U.S. 614 (1973); but cf., Lujan v. Defenders of Wildlife, 504 U.S. 555, 570 (1992) (inquiry not redressable because court order, requiring Secretary of Interior to publish new funding regulations, would not be binding on funding agencies); Holstein v. City of Chicago, 803 F. Supp. 205, 210 (N.D. Ill. 1992) (claimed injury not redressable where name plaintiff was made whole by defendant). This seems particularly true in a case, such as this, where public health issue may arise.[2]

Therefore, the court can not find "to a legal certainty that the claim is really less than the jurisdictional amount." Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995). Accordingly, the court concludes that jurisdiction is proper under § 1332.

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[2] To illustrate this point, consider the following extreme examples:

> If a single plaintiff had purchased a commodity in a jar, as on jar from a production lot of 5,000 jars, all of which had been, were being, or about to be distributed to distributors, wholesalers, retailed and consumers, and in that jar the plaintiff encountered a lethally toxic substance, and that plaintiff sought nominal damages but also remedial injunctive action to protect the health and safety of persons likely to encounter the other jars and their dangerous contents, the court might well order corrective advertising, notice, recall, or other action to protect even nonparties.
>
> A single purchaser of a headache compound who encountered a poison in the unsealed bottle might seek costly remedial action by the defendant producer or seller of the product to protect not only himself but third persons. See generally, Elsroth v. Johnson & Johnson, 700 F. Supp. 151 (S.D.N.Y. 1988) (products liability action involving Extra-Strength Tylenol package tampering).

III. CONCLUSION

For the foregoing reasons, the court denies Plaintiffs' motion for reconsideration.

IT IS SO ORDERED.

ENTER:

/s/ Charles Ronald Norgle
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 2/18/98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAMELA JEAN TYLKA, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 96 C 1647
GERBER PRODUCTS CO., a Michigan corporation,	)	Honorable Charles R. Norgle
Defendant.	)	

OPINION and ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is the magistrate judge's oral report and recommendation, dated March 30, 1999, which recommends denying Defendant Gerber Products Company's ("Gerber") motion for summary judgment. The court has reviewed the report de novo pursuant to 28 U.S.C. § 636(b)(1), see Iowa Ham Canning, Inc. v. Handtmann, Inc., 870 F.Supp. 238, 241 (N.D. Ill. 1994), and after carefully considering the report and arguments of counsel, the court finds that Gerber's objections to the report are meritorious; therefore, the report is rejected and Gerber's motion for summary judgment is granted.

I. BACKGROUND[1]

In the Spring of 1995, the Center for Science in the Public Interest ("CSPI"), an advocacy group that opposes, among other things, the use of starches and sugars in food products, issued a report that was highly critical of the baby food products manufactured and distributed by Gerber. CSPI then requested that the Food and Drug Administration ("FDA") take regulatory action against Gerber. Following an investigation, the FDA declined to take action. Undaunted, CSPI filed a subsequent similar complaint with the Federal Trade Commission ("FTC") in February 1996, but met the same fate when the FTC declined to pursue the matter.[2]

On March 22, 1996, Plaintiffs Pamela Jean Tylka, Toni Cainkar, H. Joshua Chaet, Cheryl Keller, Barbara F. Berg, and Jeanette De Leon ("Plaintiffs"), individually and on behalf of all other similarly situated consumers filed a complaint against Gerber.[3] In their amended complaint, Plaintiffs allege fraud in violation of the Illinois Consumer Fraud and Deceptive

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[1] For further background and procedural history of this case see Tylka v. Gerber Products Co., 1996 WL 341441 (N.D. Ill. June 18, 1996); Tylka v. Gerber Products Co., 1998 WL 921167 (N.D. Ill. Feb. 18, 1998); Tylka v. Gerber Products Co., 178 F.R.D. 493 (N.D. Ill. 1998); Tylka v. Gerber Products Co., 182 F.R.D. 573 (N.D. Ill. 1998).

[2] The FTC ultimately entered into a consent decree with Gerber regarding one of its advertisements. The advertisement is discussed below.

[3] Although the cases were filed individually in the Circuit Court of Cook County, Illinois, they were successfully removed to this court, see Tylka v. Gerber Products Co., No. 96 C 1647, 1996 WL 341441 (N.D. Ill. June 18, 1996), and subsequently consolidated for all purposes.

Business Practices Act ("ICFA"), 815 ILCS 505/1 et seq., the Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 et seq., and Illinois common law, in connection with Gerber's advertising of its second-stage and third-stage baby food products. These products generally include cereals, fruits, vegetables, dinners and deserts for infants between six and nine months of age. In total, Gerber sells 180 baby food products; of the 180 there are approximately 60 different second-stage products and 46 different third-stage products.

Plaintiffs claim that between February 16, 1993 and March 12, 1997, Gerber conducted "a pervasive campaign of false and misleading advertising by stating that its baby food products are nutritionally equal or superior to competing brands when many of its products are diluted with modified starch, sugar and water."[4] (Amend. Compl., at ¶ 21.) Specifically, Plaintiffs point to Gerber's best selling product, "Bananas with Tapioca." They assert that the product is partially made with plain bananas, but also includes water, modified starch and sugar. Plaintiffs also point to Gerber's "Mixed Vegetables," which they allege consists of water, carrots, wheat flour, oat flour, potato solids, tomato paste and onion powder. Additionally, Plaintiffs mention Gerber's "Plums with Tapioca," which consists of water, sugar and chemically modified tapioca. In sum, Plaintiffs claim that of the 180 Gerber baby foods products, 61 contain sugar, 42 contain modified food starch, and 32 have a combination of both.

Plaintiffs argue that Gerber's advertising of such products is false and deceptive in light of the added ingredients rendering the products less nutritious than other brands. For

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[4] Gerber disputes the period of the class and maintains that it is between February 16, 1993, and February 16, 1996. (See Gerber Rule 12(M) Statement and Reply at ¶ 1.)

example, Plaintiffs claim that Gerber used the following language to misrepresent its products and mislead consumers:

- "optimum nutrition" (Plt.'s Rule 12(N)(3) Statement, at ¶ 22, 59)
- "most wholesome nutritious safe foods you can buy anywhere in the world" (Id. at ¶ 21, 59)
- "Nutritionally, you can't buy a better baby food than Gerber." (Id. At ¶ 57)
- "Mom knows that there is nothing more nutritious and reliable for babies." (Id. at ¶ 57)
- "Pure and natural is the way we make our food.." (Id. at ¶¶ 23, 59)
- "In a few of our words, we add controlled amounts of sugar and tapioca. . . . As nutritious as any baby food you can buy." (Id. at ¶ 58)
- "The people and resources of the Gerber products Company are dedicated to assuring that the company is the world leader in, and advocate for, infant nutrition, care and development." (Id. at ¶ 25)
- "Teaching him to enjoy a variety of nutritious tastes and textures can help him learn to accept a variety of healthy foods." (Id. at ¶ 26)
- "Developing a taste for a variety of healthy foods right now is the first step in learning how to eat smart as an adult.

An no one can help you teach that lesson better than Gerber. Our carefully designed Feeding Plan includes America's most complete and trusted line of toddler food." (Id. at ¶ 27)

- "There's only one baby like yours, and only one baby food like ours, Gerber. No one knows more about purity, safety and nutrition, and how to make sure baby likes it than Gerber. To learn more about why four out of five pediatricians who recommend baby food recommend Gerber, call us anytime day or night. You know you can trust Gerber, for learning to eat smart, right from the start." (Id. at ¶ 28)

- "Teaching him to enjoy nutritious foods today is the first step in learning to enjoy healthy foods tomorrow. The first 24 months are the most impressionable, the most important to stay with Gerber. Gerber. For learning to eat smart right from the start." (Id. at ¶ 29)

- "It's easier to get her to eat fruits and veggie's now than ten years from now. So you ought to start early with a variety of nutritious Gerber baby foods. The first 24 months is the easiest time to start learning to eat smart. A lesson that can last a lifetime. The longer your child stays with Gerber now, the better her chances are of eating healthy for a long, long time to come. Gerber. For learning

to eat smart right from the start." (Id. at ¶ 30)

- "Nutritionally, you can't buy a better baby food than Gerber. The recent CSPI report concerning the nutrition of Gerber Baby Foods is false and misleading. The report implies that Gerber's use of modified food starch and sugar is irresponsible. *This is not true!*

  In fact, we conducted extensive consumer tests in the interest of obtaining maximum nutrition and acceptance of all our products. Only 2 of the top 20 selling Gerber baby foods contain added sugar and/or modified starch.

  Modified food starch and sugar are FDA approved ingredients. The use of these ingredients in select baby food items provides *better product taste and texture without sacrificing nutrition!*" (Id. at ¶ 34)

- Regarding the comparison of Beech Nut's Chiquita Bananas with Pears & Apples and Gerber's Bananas with Tapioca, Gerber advertised that "Nutritionally . . . these products are equivalent." (Id. at ¶ 35)

- In a few of our words, we add controlled amounts of sugar and tapioca to enhance taste, causing Gerber 2nd Foods to be preferred in taste tests and as nutritious as any baby food you can buy.**

> [Footnote: In taste tests, more babies preferred Gerber Bananas with Tapioca over plain banana baby foods.] Tapioca, or modified starch, is not a filler. It is a carbohydrate with many benefits and is found in many of the foods you eat." (Id. at ¶ 37)

Plaintiffs contend, with the support of expert testimony, that these statements are "blatantly false" and were used in a "sophisticated fashion, on television, radio and in national parenting magazines in coordination with direct mail and coupon advertising." (Pretrial Ord., Ex. K at 2.) Gerber vehemently denies Plaintiffs' charges. In its motion for summary judgment, Gerber argues that the statements are accurate, and in any event, are merely puffing. Further, Gerber claims that even if the statements are false, there is no evidence that they were the proximate cause of what Plaintiffs claim amounts to $ 2.41 Million in damages to Illinois consumers.[5]

II. STANDARD OF REVIEW

Courts grant summary judgment when there is no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986); O'Connor v. DePaul Univ., 123 F.3d 665, 669 (7th Cir. 1997). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." Celotex, 477 U.S. at 323-24. While the court draws all inferences in the light most favorable to the non-movant when ruling on the motion, it is "not required to draw every conceivable inference from the record [in favor of the non-movant] – only those inferences that

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[5] Nationwide, Plaintiffs' expert estimates that damages are between $45,600,000 and $57,600,000. (See Plt.'s Rule 12(N)(3) Statement, Ex. Q)

are reasonable." Chapple v. National Starch & Chem. Co. & Oil, __ F.3d __1999 WL 326320, at *2 (7th Cir. May 24, 1999) (quoting Bank Leumi Le-Israel, B.M. v. Lee, 928 F.3d 232, 236 (7th Cir. 1991)).

The party opposing the motion must present evidence of a triable issue of material fact, see Vance v. Peters, 97 F.3d 987, 990 (7th Cir. 1996), and in doing so it is required to go beyond the pleadings and designate specific facts showing a genuine issue for trial. See Bank-Leumi, 928 F.3d at 236. A fact is material when it would determine the outcome under the governing law. See Whitestine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1990). A material fact is genuinely in dispute when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986). Ultimately, if the plaintiff fails to present sufficient evidence to warrant a trial, summary judgement will be granted. See id. at 249.

III. DISCUSSION

A. Common Law Fraud and the ICFA[6]

To establish a claim of common law fraud in Illinois, a plaintiff must present evidence of: (1) a false statement of a material fact; (2) by one who knows or believes it to be true; (3) made with the intent to induce action by another in reliance on the statement; (4) action by the other in reliance on the

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[6] The court notes that although Plaintiffs allege that Gerber violated the Deceptive Trade Practices Act, 815 ILCS 510/1 et seq., Plaintiffs may recover damages, as opposed to injunctive relief, only through the ICFA. See Second Chance Body Armor, Inv. v. American Body Armor Inc., No. 94 C 6178, 1996 WL 568794, at *4 (N.D. Ill. Sep. 30, 1996) (and cases cited therein). Because injunctive relief is not relevant to this disposition, the court need not address the Deceptive Trade Practices Act claim separately. See 810 ILCS 505/2.

truthfulness; and (5) injury to the other resulting from that reliance. See Athey Prods. Corp. v. Harris Bank Roselle, 89 F.3d 430, 434 (7th Cir. 1996); Peter J. Hartmann Co. v. Capital Bank & Trust Co., 694 N.E.2d 1108, 1114 (Ill. App. Ct. 1998). Significantly, a plaintiff must demonstrate scienter and actual reliance on the other's statement. See Ollivier v. Alden, 634 N.E.2d 418, 424 (Ill. App. Ct. 1994).

Turning to the ICFA, "Illinois courts have repeatedly stressed the 'broad protective philosophy' of this legislation." Thacker v. Menard, Inc., 105 F.3d 382, 386 (7th Cir. 1996) (citing Perona v. Volkswagen of America, Inc., 658 N.E.2d 1349, 1352 (Ill. App. Ct. 1995); Duran v. Leslie Oldsmobile, Inc., 594 N.E.2d 1355, 1361 (Ill. App. Ct. 1992); American Buyers Club of Mt. Vernon, Ill., Inc. v. Honecker, 361 N.E.2d 1370, 1373 (Ill. App. Ct. 1977)). The ICFA may be employed "to the utmost degree in eradicating all forms of deceptive and unfair business practices and to grant appropriate remedies to defrauded consumers." Warren v. LeMay, 491 N.E.2d 464, 472 (Ill. App. Ct. 1986) (quoting American Buyers Club, 361 N.E.2d at 1374). Specifically, § 2 of the ICFA prohibits:

> Unfair . . . or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce. . . .

815 ILCS 505/2. Accordingly, to establish a claim under the ICFA, a plaintiff must establish: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade or commerce. See Cripe v.

Leiter, 703 N.E.2d 100, 103 (Ill. 1998); Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (Ill. 1996). When applying § 2, the court may consider decisions by the FTC and federal courts relating to section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. See 815 ILCS 505/2.

Because the terms of the ICFA are not subject to a precise definition, whether a particular set of circumstances is "unfair" or deceptive" is determined on a case-by-case basis. See Falcon Assocs., Inc. v. Cox, 699 N.E.2d 203, 209 (Ill. App. Ct. 1998); People ex rel. Fahner v. Walsh, 461 N.E.2d 78, 81 (Ill. App. Ct. 1984). Notably, the ICFA affords consumers broader protection than a common law fraud action because it eliminates the element of a scienter or the necessity of proof of actual reliance. See Thacker, 105 F.3d at 386; Martin v. Heinold Commodities, Inc., 643 N.E.2d 734, 754 (Ill. 1994); see also Brody v. Finch Univ. of Health Sciences/The Chicago Med. Sch., 698 N.E.2d 257, 267 (Ill. App. Ct. 1998) ("[T]o state a cause of action for statutory fraud, a party need not prove all the elements of common-law fraud."). Indeed, an innocent misrepresentation may be actionable. See, e.g., Smith v. Prime Cable of Chicago, 658 N.E.2d 1325 (Ill. App. Ct. 1995). Nevertheless, while proof of scienter or actual reliance are not necessary to establish a claim under the ICFA, Plaintiffs must show that the alleged misrepresentations were material, see L.R.J. Ryan v. Wersi Elec. GmbH & Co., 59 F.3d 52, 53 (7th Cir. 1995) (per curiam) (citing Duran, 549 N.E.2d at 1361 ("the materiality of the misrepresented fact is still an element of a claim under the Consumer Fraud Act")), and that the defendant's deception proximately caused their damages. See Zekman v. Direct Am. Marketers, Inc., 695 N.E.2d 853, 860 (Ill. 1998); Connick, 675 N.E.2d at 593; Wheeler v. Sunbelt Tool Co., 537 N.E.2d 1332, 1347 (Ill. App. Ct. 1989); see also Anderson v. Rizza Cheverolet, Inc., 9 F. Supp. 2d 908, 915-16 (N.D. Ill. 1998) (Norgle, J.); Lindsey v. Ed Johnson

Oldsmobile, Inc., No. 95 C 7306, 1997 WL 269627, at *4 (N.D. Ill. May 14, 1997).

Gerber makes several argument attacking the basis of Plaintiffs' action under both the common law and under the ICFA. In sum, Gerber claims that the advertisements are not misleading as a matter of law and that they are not the proximate cause of the damages that Plaintiffs allege.

B. Puffing

Gerber first argues that its advertisements are not misleading, or in any event, are nothing more than puffery. Regarding puffery, Gerber asserts that the advertisements are merely subjective descriptions and opinions which cannot lead to liability for fraud.

Asserting that statements are "puffing" is a defense to a fraud action; the defense being that the statements are merely "opinions" as opposed to "fact." See In re Diamond Mtg. Corp., 118 B.R. 588, 595 (Bankr. N.D. Ill. 1989). "Puffing in the usual sense signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud." Speakers of Sport, Inc. v. Proserv, Inc., __ F.3d ___, 1999 WL 301377, at *3 (7th Cir. May 13, 1999). "Mere subjective descriptions or opinions do not qualify as fraudulent misrepresentations of fact." Connick v. Suzuki Motor Co., Ltd., 656 N.E.2d 170, 183 (Ill, App. Ct. 1995), aff'd in part, rev'd in part, 675 N.E.2d 584 (Ill. 1996) (citing Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409 (Ill. App. Ct. 1986); Spiegel v. Sharp Electronics Corp., 466 N.E.2d 1040 (Ill. App. Ct. 1984)); see also Thacker, 105 F.3d at 386 (puffing not actionable under ICFA). Simply stated, puffing is sales talk that the buyer should discount when making a transaction because no reasonable person under the circumstances would rely on the statement when contemplating a purchase. See W. Page Keeton ET AL., Prosser and Keeton on the Law of Torts § 109 at 757 (5th ed. 1984); see also Vulcan

Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918) (Hand, J.) ("There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his own credulity.") Puffing describes a gray area separating nonspecific matters which cannot rationally support a decision from statements of a more specific, and thus, deceptive nature. See Cook, Perkins & Liehe, Inc. v. Northern California Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990). As Justice Holmes once remarked, "[t]he rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed." Deming v. Darling, 148 Mass. 504, 506, 20 N.E. 107, 108-09 (Mass. 1889).

Whether a representation will be considered a statement of opinion or a factual representation will depend upon the circumstances of the case. See Totz v. Continental Du Page Acura, 602 N.E. 2d 1374, 1383 (Ill. App. Ct. 1992). "Opinions or ambiguous statements by the salesperson may be considered as factual representations if it would be reasonable for the other party to treat it as such." Thacker, 105 F.3d at 386. In other words, if an opinion is communicated in such a way that a consumer could reasonably construe it as a statement of fact, it may be actionable. See Borcherding v. Anderson Remodeling Co., Inc., 624 N.E.2d 887, 892 (Ill. App. Ct. 1993).

In matters of advertising, the court should look to the "overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it." Federal Trade Comm'n v. U.S. Sales Corp., 785 F.Supp. 737, 744 (N.D. Ill. 1992) (addressing FTC Act) (citations and internal quotation marks omitted). The critical question is whether the "ads would be likely to mislead reasonable consumers." Id. (citing Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374 (1965)). Put another way, the "standard is whether it is a matter upon which a 'reasonable

person could be expect to rely on in determining' whether to proceed with the transaction." Cirone-Shadow v. Union Nissan of Waukegan, 955 F.Supp. 938, 944 (N.D. Ill. 1997) (quoting Heastie v. Community Bank of Great Peoria, 690 F.Supp. 716, 719 (N.D. Ill. 1988)). In this context, the Ninth Circuit has noted that the puffing doctrine applies to

> "claims [which] are either vague or highly subjective." Sterling Drug, Inc. v. Federal Trade Comm'n, 741 F.2d 1146, 1150 (9th Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 143 (1985). The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. "[A]dvertising which merely states in general terms that one product is superior is not actionable." Smith-Victor [Corp. v. Sylvania Elec. Prod., Inc.,] 242 F.Supp. [302,] 308 [(N.D. Ill. 1965)]. "However, misdescriptions of specific or absolute characteristics of a product are actionable." Stiffel [Co. v. Westwood Lighting Group,] 658 F.Supp. [1103,] 1115 [(D.N.J. 1987)]. In Smith-Victor, an advertiser's statement that its lamps were "far brighter than any lamp ever before offered for home movies" was ruled puffery. However, when the advertiser quantified numerically the alleged superior brightness with statements such as "35,000 candle power and 10-hour life," the court found a potential Lanham Act claim. 242 F.Supp. at 308-09.

Cook, 911 F.2d at 246.

In Cook, the court concluded that a collection agency's statement that they were the "low cost commercial collection

experts," implying that it had comparable services to attorneys at lower rates, was merely a general assertion of superiority and not an actionable misrepresentation. 911 F.2d at 246. The court found that the statement did "not contain the kind of detailed or specific factual assertions" necessary to state a claim for false advertising.[7] Id.

In Connick, 656 N.E. 2d at 183, a class of consumers alleged that Suzuki Motor Company made material misrepresentations while promoting one of its vehicles when it stated "'[w]hether you're on the job, or on the town, the Samurai never lets you down . . . Nothing else comes close to giving you a better run for your money'; Samurai is a 'funmobile,' with 'fun written all over it,' and a 'million laughs;' 'It won't spoil the fun knowing that the Samurai handles differently than any ordinary passenger car;' and, the Suzuki 4x4 'has a nifty, go-getter engine, . . . and all the goodies of 4-wheel drive." Rejecting the plaintiffs' allegations, the court held that such statements amounted to nothing but puffery and could not qualify as fraudulent misrepresentations of fact. See id., aff'd in part, rev'd in part, 675 N.E.2d 584 (Ill. 1996).

Similarly, in In re General Motors Corp. Anti-Lock Brake Products Liab. Litig., 966 F.Supp. 1525 (E.D. Mo. 1997), aff'd, 172 F.3d 623 (8th Cir. 1999), a class sued General Motors ("GM") for fraud in connection with its anti-lock brakes,'[are] 99 percent more effective than protective systems' such as air bags, because protective systems are rarely used, which 'drivers frequently brake aggressively or make sudden road maneuvers to avoid hazards or collisions.'" 966 F.Supp. at 1531. GM further stated that "[a] driver is 100 times more likely to benefit

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[7] Although Cook involves a puffing defense under the Lanham Act, 15 U.S.C. § 1125(a), it is instructive in this case in light of the Lanham Act's similarity to the ICFA.

from a vehicle's crash-avoidance capabilities (such as anti-lock brakes) than from its crash-survival capabilities (such as air bags)." Id. Rejecting plaintiffs' claim that they detrimentally relied on these statements, the court held, inter alia, "that such comparative claims, often involving large numbers, are puffing because a consumer cannot reasonably believe there is a test behind the claim." Id.; see also Evanston Hosp. v. Crane, 627 N.E.2d 29, 36 (Ill. App. Ct. 1993) (various representations in hospital's publications regarding quality of care were mere expressions of puffing); Hoffman v. A.B. Chance Co., 339 F.Supp. 1385, 1387-88 (M.D. Pa. 1972) (puffing where advertisement stated that product "offered unprecedented safety"); Mason v. Chrysler Corp., 653 So.2d 951, 953-54 (Ala. 1995) (puffing where national advertising campaign referenced quality of vehicles); Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 464 (Tex. Ct. App. 1990) (comparative statements claiming product superiority not actionable misrepresentations).

In his oral report recommending that this court deny Gerber's motion, the magistrate judge concluded that there is "sufficient evidence to create an issue as to whether there is more nutritious baby food than Gerber available." (Rep. Trans. at 6.) The magistrate judge reasoned:

> Plaintiffs['] . . . expert has submitted evidence that demonstrates that the use of fillers, such as, water, sugar, and chemically modified food starch rendered Gerber's products nutritionally inferior because those fillers provide calories and/or add volume but do not add nutrients. This dilution reduced the nutrient density of Gerber's products relative to the pure, natural nutritious product as it was marketed and it would otherwise have been.
>
> The court agrees with Gerber that it would not be false and misleading to simply state that its

> products are nutritious as a result of the ambiguities of such a term. Some statements are so ambiguous as to preclude a finding that such statements are false and misleading. . . . However, . . . Plaintiff[s] [have] introduced evidence that demonstrates a genuine issue of material fact exists as to whether a statement such as most nutritious contains a specific meaning or is ambiguous.
>
> In addition, the statement ["] most nutritious["] is inherently quantifiable because it implies that baby foods can be ranked or compared in their nutritional value.

(Rep. Trans. at 7-11.) After reviewing the statements that Plaintiffs submitted, the magistrate judge recommended that Plaintiffs' claims go to a jury.

Problematic is the matter of "nutrition" and how it plays role in this case. In large part, Gerber's advertisements are not specific to any extent. In fact, virtually all of the advertisements or statements that Gerber disseminate to the public refer to Gerber's baby products on a whole.[8] AS such, Gerber's advertisement that are at issue do not address the market for an individual product, but rather, they address baby food generally (e.g., "most nutritious") throughout the United States and even the world. (See Plt.'s Rule 12(N)(3) Statement at ¶ 59) ("most wholesome nutritious safe foods you can buy anywhere in the world"). Liability cannot follow for such vague, all encompassing, communications.

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[8] Plaintiffs claim that the advertisements do no address Gerber's product line on a whole because they picture specific "nutritionally inferior products." (Plt.'s Rule 12(N)(3) Statement at ¶ 8.) However, the overall net impression that the advertisement direct is toward promoting Gerber's entire product line.

Nutrition is a nebulous concept, although quantifiable in some respects. With respect to the use of the term in Gerber's advertisements, it cannot be said that the term reasonably misleads consumers. Plaintiffs argue that Gerber is involved in an extended campaign of deceit, but their allegations rely on statements that cannot support such a theory. Statements such as "optimum nutrition," or "[n]utritionally, you can't buy a better food than Gerber," or the "most wholesome nutritious safe foods you can buy anywhere in the world," add little to the daily informational barrage to which consumers are exposed.[9] These statements fall within the supermarket sales pitch; they address such a large market that they bespeak caution, and should put the reasonable consumer on alert that the comments are meaningless sales patter. See August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 618 (7th Cir. 1995) ("A 'comparison' to a mystery rival is just puffery; it is not falsifiable and therefore is not informative."). Although Plaintiffs attempt to quantify the advertisements and thus falsify

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[9] Even if the statements such as "optimum nutrition," "pure and natural are the way we make our food," and "Gerber makes the most wholesome, nutritious, safe foods you can buy anywhere in the world," were actionable, they could not provide a basis of liability to Illinois consumers. In its reply brief in support of its objections to the Recommendation, Gerber submits an affidavit by Dora Stalsberg, Gerber's International Label and Baby Care Coordinator. Stalsberg attests that Gerber prepared a particular brochure which contains these statements for international marketing purposes, but did distribute the brochure in the United States. (See Def.'s Reply, Ex. A.) The statements do not appear in any other advertisements. Accordingly, they cannot be the cause of any alleged loss in Illinois. In their sur-reply, Plaintiffs are suspicious of the timing of the affidavit, arguing essentially that it is late in the day for such revelations. Plaintiffs, however, did not submit a counter-affidavit, and have no pointed to any advertisement which otherwise contains the phrases listed above.

them with expert testimony, without more specific comparisons of specific products, no reasonable person would rely on such subjective, all encompassing, statements. See e.g. Cook, 911 F.2d at 246.

This is particularly true for Gerber's "Mom knows" or "learning to eat smart" statements. Advertisements such as "Gerber. For learning to eat smart right from the start" are not deceptive. Such advertisements are classic marketing tools that operate to enhance the image of the manufacturer. Similarly, other general observations such as "The people and resources of the Gerber Products Company are dedicated to assuring that the company is the world leader in, and advocate for, infant nutrition, care and development," simply presents no basis for consumer deception.

What remains essentially are two advertisements. The first is the direct comparison of Gerber's "Bananas With Tapioca" to Beech-Nut's "Chiquita Bananas With Peas & Apples." That advertisement, which ran in 1995, states.

> Nutritionally, you can't buy a better food than Gerber. The recent CSPI report concerning the nutrition of Gerber Baby Foods is false and misleading. The report implies that Gerber's use of modified food starch and sugar is irresponsible. *This is not true!*
>
> In fact, we conducted extensive consumer tests in the interest of obtaining maximum nutrition and acceptance of all our products. Only 2 of the top 20 selling Gerber baby food contain added sugar and/or modified starch.
>
> Modified food starch and sugar are FDA approved ingredients. The use of these ingredients in select baby food items provides *better product taste and texture without*

sacrificing nutrition!" (Plt.'s Rule 12(N)(3) Statement, at ¶34; Def. 12(M), Ex. P.)

Significantly, immediately below these paragraphs Gerber provides a nutritional breakdown of the two baby food products. In the comparison, which provides the basic data stated on product labels, Gerber compares the servicing size, calories, total fat, total carbohydrates, fiber, sugar, protein, sodium, potassium, protein, Vitamin A, Vitamin C, Calcium, and Iron.[10] Directly under the grid that lists the information, Gerber states "[n]utritionally . . .these products are equivalent." (Def. 12(M) at Ex. P.) While this advertisement contains a direct comparison to a particular competitor, it does not mislead

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[10] Specifically, the advertisement lists the following values under each category:

	Gerber 2nd Bananas With Tapioca	Beech-Nut Stage 2 Chiquita Bananas With Pears & Apples
Serving Size (oz.)	4	4
Calories	90	90
Total Fat (g)	0	0
Total Carbohydrates (g)	21	21
Fiber (g)	1	0
Sugars (g)	12	16
Protein (g)	1	0
Sodium (mg)	10	0
Potassium (mg)	170	240
% Daily Value for Infants:		
Protein	2	0
Vitamin A	0	0
Vitamin C	45	45
Calcium	0	0
Iron	0	0

in the least. In fact, it specifically provides all the product information to the public. There is no assertion that the statistics are falsified. Plaintiffs simply take issue with Gerber's repeated statements regarding nutrition and that essentially there is no better food than Gerber; but this is insufficient to establish liability. Further, in the context in which it is made, the statement "[n]utritionally . . . these products are equivalent," is a comparison of so many subsets of "nutrition" that it can only be regarded as an opinion of the manufacturer and cannot form the basis for Plaintiffs' action.

A remaining dispute in this case is Gerber's advertisement in a brochure on television that "4 out of 5 pediatricians who recommend baby food recommend Gerber." The advertisement followed a 1994 survey by Contemporary Pediatrics. The survey had an approximately 30% response rate, with 72.9% of the responders answering an inquiry regarding what brand or brands of baby food they recommend to patients. Only 76 of 408 pediatricians that answered the question recommended a specific brand, and of the 76, 67 recommended Gerber. Most did not recommend a specific brand. Nevertheless, Gerber published the advertisement as quoted above, which it defends as accurate because in most of the ads it included the qualifying language of "pediatricians who recommend baby food."

Although the 1994 study is not a model of scientific expertise, and the advertisements were the subject of a consent decrees with the FTC, the advertisements do not rise to the level of establishing a basis for a fraud action. Indeed, one version of the advertisements was qualified as it of products that they cannot provide a deceptive element is material to a reasonable consumer's decision making. In sum, the court concludes that the statements in this case are properly characterized as sales patter and puffery for which a fraud action may not lie.

C. Reliance & Proximate Cause

As an alternative ground for summary judgment, Gerber argues that Plaintiffs cannot establish the elements of reliance or proximate cause. Critical to both common law fraud and the ICFA is the connection between and act and an injury. Again, to establish a claim of common law fraud, Plaintiffs must present proof of actual reliance. See Athey Prods. Corp., 89 F.3d at 434; Peter J. Hartmann Co.,694 N.E.2d at 1114; Cahill v. Eastern Benefit Sys., Inc., 603 N.E.2d 788, 792 (Ill. App. Ct. 1992); Trautman v. Knights of Columbus, 460 N.E.2d 350, 353 (Ill. App. Ct. 1984). In an action under the ICFA, Illinois courts do not require a showing of actual reliance, but plaintiffs must demonstrate that the misrepresentations proximately caused their damages. See Adler v. William Blair & Co., 648 N.E.2d 226, 234 (Ill. App. Ct. 1995) ("as in any other tort, to sustain a cause of action under the Consumer Fraud Act, the plaintiffs must further allege that damages were proximately caused by the fraud"); see also Connick, 675 N.E.2d at 593; Wheeler, 537 N.E.2d at 1347. The requirement of a proximate relationship is a long standing principle of Illinois tort law that for recovery, there must be a casual connection between the defendant's conduct and an injury. See, e.g., Martin, 643 N.E.2d at 746 (tort action seeks compensation for loss caused by tortfeasor); see also Rodriguez v. Glock, Inc., 28 F.Supp.2d 1064, 1070 (N.D. Ill. 1998) (Norgle, J.) (granting summary judgment and quoting Prosser and Keeton, supra § 41 at 263 ("An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered . . .")); Johnson v. Owens - Corning Fiberglass Corp., 672 N.E.2d 885, 890 (Ill. App. Ct. 1996) ("Unless there is sufficient evidence for the jury to reasonably conclude that the defendant's conduct was a cause of the plaintiff's injury, plaintiff cannot present the question of

causation to the jury."); 1 M. Polelle & B. Ottley, Illinois Tort Law §14.23 (2d ed. 1998) (discussing causation in Illinois).

At this juncture, Plaintiffs argue that it is inappropriate for the court to insist on evidence of reliance and proximate cause on behalf of the class. The court has previously noted that individual issues of reliance and causation do not thwart class actions of common law fraud or actions under the ICFA. See Tylka v. Gerber Products Co., 178 F.R.D. 493, 499 & n.5 (N.D. Ill. 1998) (citing Sparano v. Southland Corp., No. 94 C 2098, 1996 WL 681273, at *3 (N.D. Ill. 1996); Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 666 (N.D. Ill. 1996); Weiss v. Winner's Circle of Chicago, Inc., No. 91 C 2780, 1992 WL 220686, at 4* (N.D. Ill. Sept. 3, 1992); Alexander v. Centrafarm Group, N.V., 124 F.R.D. 178, 186 (N.D. Ill. 1988); Barkman v. Wabash, 674 F.Supp. 623, 635 (N.D. Ill. 1987)). However, that was at the certification stage under Rule 23 of the Federal Rules of Civil Procedure. See Fed.R.Civ.P.23. The present matter is before the court under Rule 56(c) on a motion for summary judgment, see Fed.R.Civ.P.56(c), and thus, the parties are expected to present at least some proof to support each element of their claims. See Schacht v. Wisconsin Dept. of Correction, __ F.3d __, No. 96-3633, 1999 WL 224567, at *5 (7th Cir. Apr. 16, 1999) ("Roughly speaking, this is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events."); Chambers v. American Trans Air., Inc., 17 F.3d 998, 1002 (7th Cir. 1994) (once a motion for summary judgment is filed, the ball is in the plaintiff's court to "come forward with some evidence showing the existence of . . . a factual dispute.") Accordingly, Plaintiffs are required to submit some evidence showing the existence of . . . a factual dispute."). Accordingly, Plaintiffs are required to submit some evidence of reliance to support their common law fraud claim, and with respect to the ICFA, Plaintiffs are required to submit some evidence

demonstrating that Gerber's misrepresentations were "'in some reasonably direct, or proximate, way responsible for [their] loss.'" Martin, 643 N.E.2d at 747 (quoting Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. 1981), rev'd in part on other grounds, 459 U.S. 375 (1983)). Careful consideration of the record, particularly deposition testimony, is therefore necessary.

In her deposition, Plaintiff Barbra Berg testified that she had purchased Gerber since the birth of her first child in 1984. (See Berg Dep. at 24.) Berg recalled an advertisement from 1984 that stated that Gerber baby food was healthy, and she recalled Gerber's advertisement which stated, "[e]at smart right from the start." (Id. at 31, 68.) Berg, who also purchased Beech-Nut products, (see id. at 75), did not recall anything else about the advertisements, and she did not recall whether she did anything differently because of the advertisements. (See id. at 70)

Plaintiff Jeanette De Leon testified that she began buying Gerber baby food in March 1992, and did so because here mother fed her Gerber when she was a child and recommended that she raise her own children with Gerber. (See De Leon Dep. at 31-32) De Leon could not recall any specific claim in any type of Gerber advertisement since 1993, except that she recalled store coupons or displays stating that Gerber was "healthy." (Id. at 52) De Leon did not change her buying habits due to any advertisements. (See id. at 82.)

Plaintiff Cheryl Keller began buying Gerber baby food in 1991. She remembers seeing two advertisements since 1993; one was a television advertisement that state "feeding your baby Gerber baby foods . . . will develop healthy eating habits in later years," and the other advertisement was the "four out of five pediatricians" advertisement appearing in print. (Keller Dep. at 94, 99-101.) Keller did not see the first ad when she was purchasing Gerber 2nd and 3rd stage foods and was not sure

whether she was still purchasing them when she saw the advertisement referring to pediatricians. (See id.) Keller does not recall changing her habits on account of the advertising. (See id. at 101.)

Plaintiff Pamela Tylka started purchasing Gerber baby food in 1992. Her pediatrician recommended both Gerber and Beech-Nut baby foods. (see Tylka Dep. at 38.) Tylka recalled seeing the label of ingredients when she purchased "Bananas with Tapioca" and that the product included water. (See id. at 40.) Tylka did not recall seeing that the label included tapioca starch. (See id.) With respect to the water, Tylka stated:

> Q: Did it concern you that the bananas with Tapioca product of Gerber's that you [] purchased contained water?
>
> A: Not at that time.
>
> Q: It concerned you later?
>
> A: It concerns me now.

(Id.)

With respect to advertisements, Tylka recalled "a fat Gerber baby," and the words "healthy" and "nutritious." (Id. at 72) She also remembered the advertisement stating that "four out of five pediatricians that recommend baby food recommend Gerber," but she did not recall the entire advertisement or when she heard it, nor did she remember doing anything differently on account of the advertisement. (Id. at 76, 84.)

Plaintiff Joshua Chaet purchased Gerber baby food between October 1995 and the Spring of 1996. (See Chaet Dep. at 14, 22.) Although Chaet knew some of Gerber's products contained added sugar and starches, he stated:

> I felt comfortable buying it because I felt comfortable with Gerber. And I read the label,

> but I wasn't thinking that - you know, the same I would think for me if I was buying it. WE have a lot of low-fat, low-sugar things in my house, but that didn't stop me from buying it for Hannah because I thought I was buying a good product because it was Gerber and there must be some reason, some benefit, something that isn't there.

(Id. at 27.) Chaet could not identify any specific Gerber advertisements that he read when making any decisions, noting: "I don't remember the specific ad, so I can't say specifically. It's kind of like I have a warm, fuzzy feeling from reading it." (Id. at 77.) In Chaet's opinion, after reading Gerber's advertisement he did not feel that any baby food could be superior to Gerber. (See id. at 79.)

Plaintiff Toni Cainkar began purchasing Gerber baby food in February 1992 because of Gerber's reputation and the variety of products it offered. Cainkar had difficulty recalling the specifics of any advertisements. (Cainkar Dep. at 78.) However, she mentioned "babies are our business," and recalled some event involving Gerber and Beech-Nut where Gerber advertised "We won't do to you what Beech-Nut did, 100 percent pure." (Id.) Cainkar further testified:

> Q: I'm just trying to find out the range of advertisements of Gerber that you recall.
>
> A: I know I have seen Gerber commercials on television. I know I have seen Gerber, the coupons in the newspaper. Flipping through my magazines, I'm sure I have seen - I just remember seeing the name, Gerber, Gerber.
>
> Q: Do you recall anything more particular about what the advertisements of Gerber's said?
>
> A: Other than what I told you, no.

Q: Okay.

A: Whatever ads I saw made me feel confident that the food my kids were getting was the best.

Q: Do you recall any advertisements that made any statements regarding nutrition in Gerber food products?

A: I can't recall all the details. Again, I had already been sold on the Gerber product, so it wasn't like I was - needed to continue doing research. I already thought that - Once I made the decision to rely on Gerber products, I didn't feel the need to continue checking into the Gerber product.

(Cainkar Dep. at 78-79.)

Viewed objectively, the testimony of these six individuals provides no proof of a connection between deceptive conduct and their purchase decisions. There is insufficient evidence of either reliance or proximate cause from which a reasonable jury could conclude that Gerber's alleged misrepresentations were the cause of Plaintiff's decision to purchase Gerber products, specifically Gerber's products containing allegedly "adulterated" materials such as "Bananas with Tapioca."

Plaintiffs argued that specific evidence of reliance is unnecessary because the pervasiveness of the false advertising gives rise to a presumption of reliance. In support of this argument, Plaintiffs rely principally on the California Supreme Court's decision in Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal 3d 197, 637 P.2d 660 (Cal. 1983). In Children's Television, a class alleged claims of common law fraud against a breakfast cereal manufacturer, a retailer, and two advertising agencies, in connection with their promotions of cereals that were directed toward children. The promotions, which ran widely on television in California,

implied that children who ate sugared cereals, that were essentially "sugar products or candies" or "candy breakfasts," were stronger, happier, braver, and more energetic than children who did not eat the cereals. 35 Cal.3d at 205 n.3. Other advertisements stated that sugared cereals were "grain products," were "healthful and nutritious," and were the "most important part of a well balanced breakfast." Id.

The defendants demurred, arguing that the complaint did not state an action because there was no indication that any plaintiffs relied on, or saw, any particular television advertisements. The court held that the failure to point to specific advertisements was not critical, explaining:

> A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date. Children in particular are unlikely to recall the specific advertisements which led them to desire a product, but even adults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make the purchase. Plaintiffs should be able to base their cause of action on an advertising campaign even if they cannot recall the specific advertisements.

Id. at 219.

Seemingly broad in scope, the California Supreme Court addressed the Children's Television holding in Mirkin v. Wasserman, 5 Cal. 4th 1082, 858 P.2d 568 (Cal. 1993). In Mirkin, a class of shareholders of a health plan corporation brought an action for deceit and negligent misrepresentation against the corporation, claiming that the corporation had misrepresented its financial condition in various communications, and thereby inflated its stock price. The plaintiffs pled that they purchased stock in the corporation in

reliance upon the integrity of the securities market; they did not allege that they read or heard any of the corporation's representations. The court rejected the plaintiffs' reliance on Children's Television as a manner of avoiding the necessity of alleging and proving actual reliance stating:

> Plaintiffs read Children's Television as adopting, albeit not in so many words, the fraud-on-the-market doctrine. According to plaintiffs, "Children's Television recognizes that reliance is sufficiently pled if it is alleged that the defendant made misrepresentations to the marketplace, or a segment of it, ' intending to influence the behavior of the ultimate purchaser, and that he succeeds in this plan.'" We do not believe, however, the Children's Television supports such a proposition. If the court had actually intended to announce such a drastic change to settled law on a point as important as the nature of reliance in an action for deceit, one would expect to the see the announcement of the new rule to be supported with reasons and citation to authority. Instead, one finds only a single sentence, unsupported by reasoning or authority and phrased in tentative language: "Repetition . . . should not be a prerequisite to liability . . ." (35 Ca.3d at p. 219, 673 P.2d 660.)

Mirkin, 5 Cal.4th at 1099.

Ultimately, the Mirkin, court concluded that "[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." 5 Cal.4th at 1103 (internal quotation marks and citation omitted). Consequently, proof of reliance remains a necessary pre-requisite in California, as it is for a common law

fraud claim in Illinois, another state that does not recognize the fraud-on-the-market doctrine. See Gilford Partners, L.P. v. Sensormatic Electronics Corp., No. 96 C 4072, 1997 WL 757295, at *12 (N.D. Ill. Nov. 24, 1997); In re Soybean Futures Litig., 892 F.Supp. 1025, 1060 (N.D. Ill. 1995); Morse v. Abbot Lab, 756 F.Supp. 1008, 1112 (N.D. Ill. 1991); Good v. zenith Electronics Corp., 751 F.Supp. 1320, 1323 (N.D. Ill. 1990). It is not the office of this court to now inject a new legal theory or presumption into the state's jurisprudence and essentially modify the state's action at common law. See Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F.3d 1087, 1093 (7th Cir. 1999) ("Lacking any inherent power to make state law such as a state court might have, through interpretation of state statutes or creation of common law rules, a federal court must be careful to avoid the temptation to impose upon a state what it, or other jurisdictions consider to be a wise policy."). "The common law is a beautiful system; containing the wisdom and experience of ages." Penny v. Litt, 4 Ill. 301, 304 (Ill. 1841). That experience teaches that common law fraud requires proof of each element, including reliance. Because Illinois law does not allow a presumption of reliance in this circumstance, the court will not hastily create one.

However, the court notes that in response to the complexities of class litigation in this area of the law, other courts in this district have bifurcated the issues of causation and damages in similar actions. See Lindsey v. Ed Johnson Oldsmobile, Inc., No. 95 C 75306, 1997 WL 269627, at *5 (N.D. Ill. May 14, 1997) (refusing to certify issues of causation and damages); Romaker v. Crossland Mtg. Corp., No. 94 C 3328, 1996 WL 254299, at *2 (N.D. Ill. May 10, 1996) (same); Sparano, 1996 WL 681273, at *3 (resolving any individual issues of reliance in ths damage phase). While this option is

available (as discussed in Tylka, 178 F.R.D. at 499),[11] the court believes that it is nonetheless necessary for those individuals who represent the class to provide some evidence supporting each element of their case. They fail to do so.

First, the court ruled the Gerber's statements are mere puffery and sales patter and thus are not material statements. Therefore, they cannot be the cause of the alleged damages in this case as a matter of law. Second, even if the statements could be material and thus reasonably relied upon, the deposition testimony provided in opposition to Gerber's motion is insufficient to create a genuine issue of fact.

After several years of preparation and discovery in this matter, none of the named plaintiffs are able to state that they relied on specific deceptive advertisements at a certain point in time when making a purchase decision. Plaintiffs' claim of reliance on Gerber's advertising campaign as a whole in inappropriate because it takes into account all of Gerber's advertising which creates, in Plaintiff Chaet's words, "a warm fuzzy feeling." But the fraud, if any, must be more particular and Plaintiffs must act upon it. Plaintiffs' unequivocal testimony, however, establishes that they did not take any course of conduct with respect to a deceptive statement which led to any damages. Accordingly, an action for common law fraud is not tenable.

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[11] In this regard, the court notes that Plaintiffs' damages calculation of approximately $2.41 Million is improper because it is based on market analysis of Gerber's relative costs and profits in Illinois without consideration of reliance and proximate cause, which are necessary to establish Plaintiffs' claims. (See Abrams Affs., Exs. P & Q to Plts.' Rule 12(N)(3) Statement.) Any alternative method of determining damages would be necessary in subsequent proceedings.

Furthermore, there is no evidence of proximate cause to support an action under the ICFA. Again, although proof of reliance is not a necessary element to an action under the ICFA, Plaintiffs must establish that the allegedly deceptive statements were "in some reasonably direct, or proximate, way responsible for [their] loss," or in other words, "loss causation." Martin, 643 N.E.2d at 747 (internal quotation marks and citation omitted); see also L.R.J. Ryan, 59 F.3d at 54. While the distinction between actual reliance and proximate cause is not clear, see Zekman v. Direct American Marketers, Inc., 675 N.E.2d 994, 1001 (Ill. App. Ct. 1997) (Gordon, J. dissenting) ("[S]uch proximate cause by inherent necessity requires that there be some degree of reliance.") rev'd, 695 N.E.2d 853 (Ill. 1998), what is clear is that the loss must follow from the defendant's conduct. Here Plaintiffs fail to demonstrate such a loss in the record.

Plaintiffs fail to show how any allegedly deceptive statement led to their injuries. To survive summary judgment, Plaintiffs must submit evidence that "but for" some deception or falsehood, no injury would have occurred. Plaintiffs' deposition testimony reflects that Plaintiffs have vague perceptions which they attempt to link to Gerber's nationwide advertising. But Vague recollections are not enough; there must be enough from which a jury could reasonably conclude that the defendant's conduct was the proximate cause of the injury. See generally, Rodriguez, 28 F.Supp.2d at 1070; Johnson, 672 N.E.2d at 890. Without evidence connecting deceptive advertising to a loss, there is no proof of "loss causation," and no issue for trial. Because Plaintiffs fail to submit evidence of reliance and causation, the court grants Gerber's motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the court grants Gerber's motion for summary judgment.

IT IS SO ORDERED:

ENTER:

/s/ Charles Ronald Norgle
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 6/29/99

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF ILLINOIS
EASTERN DIVISION

Paula Tylka, individually and on behalf of all others similarly situated,	)	Circuit Court of Cook County, Illinois Case No. 96 CH 2068
Plaintiff,	)	
v.	)	U.S.D.C. No. 96-1647 Hon. Judge Norgle Magistrate Judge Denlow
Gerber Products Company, a Michigan corporation,	)	
Defendant.	)	

NOTICE OF REMOVAL

To: Michael J. Freed
Attorney for Plaintiff
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Clerk of the Court
Circuit Court of Cook County
Chancery Division
Richard J. Daley Center
Chicago, IL 60602

Defendant Gerber Products Company ("Gerber"), by its undersigned counsel, Dickinson, Wright, Moon, Van Dusen & Freeman, hereby removes this action from the Circuit Court of

Cook County, Illinois, where it is pending, to the United States District Court for the Northern District of Illinois.

In support of this Notice of Removal, Gerber states:

1. On or about February 29, 1996, Plaintiff commenced an action against Gerber in the Circuit Court of Cook County by filing a Complaint entitled: "Paul Tylka, individually and on behalf of all others similarly situated, Plaintiff, v. Gerber Products Company, a Michigan corporation, Defendant," Case No. 96 CH 2068. The Summons and Complaint, copies of which are attached hereto as Exhibit A, were served on Gerber on March 8, 1996, and no further proceedings have been had in the action.

2. According to the allegations of the Complaint, Plaintiff is an individual who resides in Illinois. (Complaint, ¶ 2.) Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes.

3. Gerber is a Michigan corporation with its principal place of business in Michigan. (Complaint, ¶ 3.) Accordingly, Defendant is a citizen of Michigan for jurisdictional purposes. 28 U.S.C. § 1332(c)(1).

4. The matter in controversy, exclusive of interest and costs, exceeds the sum of $50,000, insofar as Plaintiff, in her complaint, seeks mandatory injunctive relief the value of which greatly exceeds the sum of $50,000, and Plaintiff also seeks to establish common funds for attorneys' fees and punitive damages, which Gerber believes will exceed $50,000.

5. This action is therefore removable to this court pursuant to 28 U.S.C. § 1441, because it falls within this Court's original diversity jurisdiction and because no Defendant properly joined is a citizen of the state of Illinois.

6. This Notice of Removal is filed within thirty (30) days after receipt by Gerber of the Summons and Complaint,

and is therefore timely filed pursuant to 28 U.S.C. § 1446(b). Copies of this Notice of Removal will be served promptly on all adverse parties, and a copy of the Notice of Removal will be filed promptly with the Clerk of the Circuit Court of Cook County, Illinois, all as required by 28 U.S.C. § 1446(d).

Respectfully submitted,

GERBER PRODUCTS COMPANY

By: /s/
One of its Attorneys

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STATUTORY PROVISIONS INVOLVED

1. ***28 U.S.C. § 1367(a) and (b) provide:***

"(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

"(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

2. ***28 U.S.C. § 1446(a) provides:***

"A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal

signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action."

3. ***28 U.S.C. § 1653 provides:***

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

4. ***Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:***

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it * * *.

* * * *

"(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

* * * *

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

5. ***Rule 81(c) of the Federal Rules of Civil Procedure provides in pertinent part:***

> "(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. * * *"

Supreme Court, U.S.
FILED
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(2)

No. 00-387

IN THE

Supreme Court of the United States

GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA G. TYLKA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Appellate Court correctly remanded this case to state court after it identified, at oral argument, a fatal jurisdictional defect in Petitioner's removal notices, cited Petitioner to 28 U.S.C. § 1653 as the proper method of correcting that defect, directed Petitioner to do so, warned Petitioner that failure to amend would lead to remand to state court, and allowed Petitioner more than two months to act, following which the Appellate Court remanded the case to state court?

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Cases:

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Allen v. Wright, 468 U.S. 737 (1984) 18

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 16

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Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) 16, 17, 22, 23

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Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 22

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FDIC v. Santiago Plaza, 598 F.2d 634 (1st Cir. 1979) 15

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Fry v. Layne-Western Co., 282 F.2d 97 (8th Cir. 1960) 16

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 18

Cited Authorities

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Gilbert v. David, 235 U.S. 561 (1915)	13
Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977)	2
Guaranty National Title Company, Inc., v. J.E.G. Associates, 101 F.3d 57 (7th Cir. 1996)	12, 23
Handy v. Uniroyal, Inc., 298 F. Supp. 301 (D. Del. 1969)	15
Harris v. American Legion, 162 F. Supp. 700 (S.D. Ind. 1958) 261 F.2d 594 (7th Cir. 1958), *rehearing denied*	19
Hormel v. Helvering, 312 U.S. 552 (1941)	26
In re Brand Name Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997)	26
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Joy v. Hague, 175 F.2d 395 (1st Cir 1949), *cert. denied*, 338 U.S. 870	20
Kaufman v. Western Union Tele. Co., 224 F.2d 723 (5th Cir. 1955)	16
Kinney v. Columbia Savings & Loan Ass'n., 191 U.S. 78 (1903)	10, 11

Cited Authorities

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Lindros v. Fortuna, 157 F.3d 945 (2nd Cir. 1998) ..	13
Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563 (1941)	8
Razdan v. General Motors Corp., 99-3012 (7th Cir. 1999)	20, 27
Robertson v. Cease, 97 U.S. 646 (1878)	12
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Three J Farms, Inc. v. Alton Box Board Co., 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911, 100 S. Ct. 1090, 63 L. Ed. 2d 327 (1980) 15

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Title 28 U.S.C., 1940, ed. § 399, Mar. 3, 1911, c. 231, § 274c, as added Mar. 3, 1915, c. 90, 38 Stat. 956 15

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Northern District of Illinois Local Rule 81.2 Removals; Remands of Removals (West 2000) 21

United States Supreme Court Rule 10 25

Other Authorities:

http://www.ca7.uscourts.gov/dkt.htm, (last visited October 5, 2000) 27

http://www.thesaurus.com/ (last visited October 5, 2000) 10

Kirszner & Mandell, *The Holt Handbook, Second Ed.*, Holt, Rinehart & Winston, Inc. (1989) 11

Webster's Encyclopedic Unabridged Dictionary of the English Language, (Ed. 1996) 4,10

Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc. 1989 11

Cited Authorities

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Wright & Miller: Fed. Prac. & Proc. § 3611, The Requirement and Meaning of Citizenship-in General (1982)	19
Wright, Miller, Cooper, Fed. Prac. and Proc. § 3602, Jurisdiction and Related Matters, 2000 Pocket Part (West 2000)	19
Wright, Miller, & Cooper, 14A Fed. Prac. & Proc. § 3739 (1990)	15
Wydick, *Plain English for Lawyers, Fourth Ed.*, Carolina Academic Press, (1998)	11

JURISDICTION

Jurisdiction is lacking to review this remand order.

There is no jurisdiction for the Court to grant certiorari. This case is within the statutory prohibition of review of remand orders to state court. Under 28 U.S.C. § 1447(d) "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .".

Petitioner's only case cited in support of this Court's jurisdiction is *Aetna Ca. & Sur. Co. v. Flowers*, 330 U.S. 464 (1947) which applies 28 U.S.C. § 1447(d)'s *predecessor*, which limited jurisdiction to review remands by the district courts. Subsequent to the *Aetna* decision, Congress amended the statute to delete the distinction between the district courts and the appellate courts, thus precluding jurisdiction to review remands by either one. When *Aetna* was decided the statute read, "and no appeal or writ of error from the decision of the *district court* so remanding." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Emphasis added) (quoting § 1447(d)'s predecessor statute) (Rehnquist, J. dissenting). The current statute withdraws the limitation held in *Aetna* by deleting the "district court" language and substituting the much broader prohibition of review of remand orders now found in the statute — "not reviewable on appeal or otherwise," 28 U.S.C. § 1447 (historical and statutory notes), and thus limits the review of remand orders even in the Supreme Court of remand orders from Appellate Courts.

Most similar is *Volvo of America v. Schwarzer*, 429 U.S. 1331 (1976), where the applicant in a class action sought a stay from the Northern District Court of California's remand

to the California state court system. But this Court denied the stay, rejecting to hear the case as "not subject to review" . . . "presumptively barred by the operation of 28 U.S.C. § 1447(d)." *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (regarding roots of § 1447(d) and recodification in 1948, "neither disturb[ing] nor tak[ing] issue with the well-established general rule that 1447(d) and its predecessors were intended to forbid by appeal . . . any order remanding a case on the grounds permitted by the statute."). In *Thermtron*, Chief Justice Rehnquist's dissent (writing as an Associate Justice) stated, "[b]ecause I am convinced that both the Court of Appeals and *this Court are without jurisdiction* to consider the merits of Petitioners' claims, I would affirm the judgment below." *Thermtron*, 423 U.S. at 361 (Rehnquist, J. dissenting) (Emphasis added). *See also Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995); *and Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam) (describing statute as unmistakable command).

Accordingly the Court lacks jurisdiction to review the Seventh Circuit's remand order.

STATUTES INVOLVED

Petitioner's brief omits 28 U.S.C. § 1447(d) which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

The former version of 28 U.S.C. § 1447(d) was 28 U.S.C. § 71 (1946 ed.) which provided:

> Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

cited in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1976) (Rehnquist, J. Dissenting).

STATEMENT OF THE CASE

Petitioner's notice of removal alleged that diversity jurisdiction existed because, and only because, Plaintiffs had alleged residency in their state court complaints:

> 2. According to the allegations of the Complaint Plaintiff is an individual who resides in Illinois. (Complaint, ¶2.) Thus, Plaintiff is a citizen of Illinois for jurisdiction purposes.

(Pet Appendix at 62a).

Petitioners notices of removal defectively alleged *residency* rather than *citizenship*. The conclusion of citizenship drawn from the allegation of residency alone, however, is improper. It is a non sequitur. It is "an inference or a conclusion that does not flow from the premises . . .

a statement containing an illogical conclusion." Webster's Encyclopedic Unabridged Dictionary of the English Language, (Ed. 1996).

Petitioner failed to amend its jurisdictionally defective allegation at any time before the remand order of the Seventh Circuit and never created a factual record to establish citizenship.

On February 22, 2000, when this case was argued before the Seventh Circuit, the Court of Appeals advised Petitioner of a fatal jurisdictional defect in its removal petitions and gave Petitioner an opportunity to cure the defect by amending its notices of removal under 28 U.S.C. § 1653 or face remand:

> JUDGE EASTERBROOK: I hate to say this, but it looks to me like there's a jurisdictional problem independent of that which none of the parties have discussed. I can't tell that the parties are a diverse citizenship.
>
> * * *
>
> The complaints filed in state court all allege that one or another Plaintiff is a quote resident of Illinois. . . . Which is not the — . . . — pertinent to the question of federal subject matter jurisdiction. . . . And the Supreme Court of the United States has held repeatedly, as have we, that an allegation of residence is jurisdictionally insufficient. Looks to me like these cases were removed from state court without proper allegations of jurisdiction — without proper allegations of diversity of citizenship. . . .

> *[P]roblem is that 28 U.S.C. 1653 permits the allegations of jurisdiction to be amended even in the Court of Appeals.* So if it is possible truthfully to amend the allegations of jurisdiction to allege domicile as opposed to residence, then maybe there's diversity. *But until that happens, we certainly don't have it on the allegations in this record.* (Transcript, Feb. 22, 2000, at 2 - 4, Appendix at 1a). (Emphasis added).

The Seventh Circuit's direction was clear. The Seventh Circuit explicitly raised the issue *and fairly allowed Petitioner to cure its defect.* It was Petitioner's removal, so it was *Petitioner's* obligation to amend the removal notice, not the obligation of Plaintiffs or the Court of Appeals.

> MR. WILHELM [Gerber's counsel, Petitioner here]: My plan, your Honors, is to emphasize three points. The first is the point that I think has already been emphasized —
>
> JUDGE EASTERBROOK: The first plan ought to be to talk about whether we have diversity of citizenship.
>
> MR. WILHELM: Yes, your Honor. After removal when the —
>
> JUDGE EASTERBROOK: *The notices of removal Gerber filed are amazing. They say, well, the complaint alleges that X is a resident of Illinois; therefore, X is a citizen of Illinois. That's just not true. It's a non sequitur.*

> The Supreme Court has — had the district court been alert, these cases would have been remanded in an hour, and that would have been the end because you couldn't have appealed that remand.
>
> MR. WILHELM: The fact that you raise — that you raise an issue about though has been confirmed in depositions where all of the named Plaintiffs were deposed. All of them testified as to their state of domicile. All of them testified that they were — they were indeed citizens of the state of Illinois — . . .
>
> JUDGE EASTERBROOK: *You then may be able to amend* the complaints —
>
> MR. WILHELM: Correct.
>
> JUDGE EASTERBROOK: Under Section 1653.
>
> MR. WILHELM: Correct.
>
> JUDGE EASTERBROOK: And you should count your lucky stars because this case should have been remanded instantly because *these notices were transparently defective*. (Oral Argument, Feb. 22, 2000, Transcript at 14-16, Appendix at 4a.). (Emphasis Added).

By May 1, 2000, more than two months after oral argument, Petitioner still had not followed the Seventh Circuit's direction to amend its defective notices of removal or face remand on the ground that the notices of removal were defective. Accordingly, the unanimous Court ordered

the case remanded to the Illinois court system. (Pet. Appendix at 1a). The Seventh Circuit's opinion emphasized the admonishment given the Petitioner at oral argument, "we certainly don't have [jurisdiction] on the allegations in this record." *Tylka v. Gerber*, 211 F.3d 445 (7th Cir. 2000) (Pet. Appendix at 7a).

Even then, Petitioner waited 12 days after the Appellate Court's forewarned remand decision before filing an amended notice of removal and simultaneously moving for rehearing *en banc* on May 12, 2000. (Pet. Appendix at 8a). The Seventh Circuit struck Petitioner's then twice-tardy § 1653 amended notice of removal and denied rehearing *en banc* on June 8, 2000.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to hear this remand decision to state court by the Appellate Court pursuant to 28 U.S.C. § 1447(d).

The Petitioner, defendant-appellee below, seeks this Court's review to avoid the consequences of its own strategic decision to disregard the Seventh Circuit's explicit warning to file amended notices of removal because its notices of removal were facially defective. During oral argument, the Seventh Circuit not only pointed out the defect but directed Petitioner's counsel to correct its faulty notices of removal (if it could). Judge Easterbrook cited Petitioner's counsel to the specific statute permitting amendment at that time, 28 U.S.C. § 1653, to cure the defect, and *warned* Petitioner that the Seventh Circuit would send this case back to the state court if the jurisdictionally fatal defects were not cured. After waiting two months for Petitioner to act, the unanimous Court of Appeals, in an opinion authored by Judge Coffey, remanded the case to state court.

Petitioner's tardy attempt to amend its jurisdictionally defective notices of removal after that decision and request for reconsideration by the Court of Appeals *en banc* were correctly rejected by the Seventh Circuit.

Petitioner inappropriately asks this Court to undo the result of its own decision by disingenuously protesting confusion, alleging fictitious splits between the circuits, and claiming unfairness — all of which this Court can ignore. Further, Petitioner presents a question addressed in *Free v. Abbott,* 99-391, last term that *was not reached* by the Seventh Circuit below.

REASONS FOR DENYING THE WRIT

I. The Supreme Court Lacks Jurisdiction to Review this Case.

The Supreme Court lacks jurisdiction to review the decision to remand to the Circuit Court of Cook County, Illinois. 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca,* 516 U.S. 124 (1995) (only cases meeting the grounds in § 1447(c) are immune). In interpreting 28 U.S.C. § 1447(d), this Court held that, "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered* 516 U.S. at 127. In a consumer class action which presented this same issue, Chief Justice Rehnquist denied a stay of remand to state court under §§ 1447(c) and (d), holding that the Court was presumptively barred and lacked jurisdiction. *Volvo of America Corp. v. Schwarzer,* 429 U.S. 1331 (1976). In *Metropolitan Casualty Ins. Co. v. Stevens,* 312 U.S. 563 (1941) the district court held the case was not removable and remanded it to the state court. This Court held "we are not at liberty to review the remand order."

Petitioner cites *Aetna v. Flowers*, 330 U.S. 464 (1947) as alleged support of this Court's jurisdiction to review decisions to remand a cause to the state court. However, that case interpreted 28 U.S.C. § 1447(d)'s predecessor statute which bared review of remands from district courts which this Court interpreted as not baring its own review of remands from an appellate court. However, after the *Aetna* decision, that distinction was deleted by Congress, and the current much broader language was substituted as is currently found in 28 U.S.C. § 1447 (historical and statutory notes). *See supra* Jurisdiction at 1.

II. The Seventh Circuit Correctly Read the Petitioner's Notice of Removal.

A. Petitioner's Argument that the Seventh Circuit Disregarded Petitioner's Removal Language Is Wrong.

Petitioner attempts to misconstrue its own jurisdictionally defective language. Petitioner attempts to construe its notices of removal as alleging citizenship because, and only because, according to the Plaintiffs' allegations in their state court complaints, Plaintiffs are residents of Illinois. This does not follow, as matter of law or as a matter of English usage and grammar.

Petitioner claims that the Court of Appeals disregarded the latter clause of its notice of removal. As the transcript of oral argument and opinion by the Seventh Circuit clearly demonstrate, Petitioner is wrong. The Court of Appeals considered the second clause, and found that it was a conclusion that did not flow from the premise. The Seventh Circuit correctly held that Petitioner's notices of removal referred to residence of the plaintiffs and not their citizenship as required by 28 U.S.C. § 1332(a)(1). (Pet. Appendix at 4a).

As the Seventh Circuit correctly observed, Petitioner's averments of citizenship were based on a non sequitur. A non sequitur is "an inference or a conclusion that does not flow from the premises . . . a statement containing an illogical conclusion." Webster's Encyclopedic Unabridged Dictionary of the English Language, (Ed. 1996); a statement "that does not follow logically from what preceded it." *http://www.thesaurus.com/* (last visited October 5, 2000).

Moreover, before Petitioner filed its notices of removal, it did not complete any discovery on the issue. For example, Petitioner did not comply with the (then-numbered) Local Civil Rule 3, calling for discovery regarding the diversity of citizenship requirement. Petitioner also ignored the procedure set by 28 U.S.C. § 1446(b), which contemplates removal after discovery where the initial pleading is not removable (on "receipt" of "other paper"). When Petitioner did take discovery, it did not ask the question about citizenship of any of the named plaintiffs, and Petitioner has not claimed that it did. Yet, Petitioner states categorically, but incorrectly, that citizenship had been demonstrated by discovery. (Transcript, Oral Argument, Feb. 22, 2000, Transcript at 14-16) (Appendix at 4a.).

Indeed, Petitioner's citation to *Kinney v. Columbia Savings & Loan Ass'n.*, 191 U.S. 78 (1903), undermines its argument. (Pet. at 15). The phrase and allegation "a resident *and* a *citizen* of the City of Denver and state of Colorado" (emphasis added) in that case is *absolutely materially distinguishable* from the Petitioner's own averment in this case. In *Kinney*, the allegation is one of citizenship *in addition to* residency. By contrast, Petitioner here alleges citizenship that is the same as residency, not *an additional allegation to* residency. Petitioner's confusion is with the

proper usage of the word "and" versus the usage of the word "thus." The word "[*t*]*hus* means 'in this way,' not 'therefore' or 'so.' [i.e.] In Joseph Conrad's *Heart of Darkness*, Kurtz becomes a man-god to the natives. *Thus*, he is able to collect a fortune in ivory." Kirszner & Mandell, *The Holt Handbook, Second Ed.*, Holt, Rinehart & Winston, Inc. (1989) at 759; Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc., 1989. The word "and" is "used as a function word to indicate connection or addition . . ." Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc., 1989. Further, the *Kinney* averment has no period in it, while Petitioner's residency allegation does have a period in it. A period is used "to end a declarative sentence." Wydick, *Plain English for Lawyers, Fourth Ed.*, Carolina Academic Press, (1998) at 105. Hence, when the Petitioner ended its allegation of residence with a period, it made a declaration. Petitioner then made a presumption based on the previous declaration by its use of the word "thus." The allegation in *Kinney* is materially distinguishable since it makes one declarative statement using the connective word "and" without drawing a conclusion that residence is the same as citizenship.

B. The Seventh Circuit Did Not Apply a Heightened Pleading Standard.

Petitioner argues that the Seventh Circuit required a heightened pleading of citizenship by "demanding not only that defendants allege the 'citizenship' of the plaintiffs but also the factual basis for such allegation." (Pet. at 10). Gerber is wrong. The Seventh Circuit only required a proper allegation of citizenship, that is, an allegation of citizenship, not residence. Such a requirement is the uniform rule.

1. The Petitioner Alleges a Conflict Between the Circuits Regarding the Pleading Requirements in Removal, but Cites No Authority In Support of Any Conflict.

Contrary to Petitioner's claim, nowhere in its opinion below, as alleged by the Petitioner, does the court state that there is a heightened fact pleading requirement. The Seventh Circuit's opinion was correct that "[w]hen the parties allege residence but not citizenship, the court must dismiss the suit." *Guaranty National Title Company, Inc. v. J.E.G. Associates*, 101 F.3d 57, 59 (7th Cir. 1996).

As the decision by the Seventh Circuit to deny reconsideration *en banc* reflects, there is no split of authority within the Seventh Circuit and there is no deviation from previous decisions by the Supreme Court. The Seventh Circuit decision is amply supported by long standing decisions of this Court. Judge Coffey's opinion cited numerous decisions by this Court that Petitioner does not distinguish, including: *Steigleder v. McQuesten*, 198 U.S. 141 (1905) ("[I]t has long been settled that residence and citizenship are wholly different things . . ."); *Denny v. Pironi*, 141 U.S. 121 (1891) ("an averment of residence is not the equivalent of an averment of citizenship"); *Robertson v. Cease*, 97 U.S. 646 (1878); *America's Best Inns, Inc. v. Best Inns of Abilene, LP.*, 980 F.2d 1072 (7th Cir. 1992). The Seventh Circuit also correctly cited its own previous decisions. In *Guaranty* "[a]t oral argument we told counsel that it is essential to put into the record the . . . citizenship." *Guaranty*, 101 F.3d at 58. And when in *Guaranty* the parties "[h]aving received that aid from the bench" did not follow the directions, as Petitioner failed to do here, the judgment was vacated and the case remanded to state court.

See America's Best Inns. Inc. v. Best Inns of Abilene, 980 F.2d 1072 (7th Cir. 1992) ("[f]ederal law citizenship means domicile, not residence" *citing Gilbert v. David*, 235 U.S. 561 (1915), and where the litigants were told at "oral argument" to file under § 1653 and "counsel did not do it" the judgment was vacated with instructions to dismiss for lack of subject matter jurisdiction.).

2. Cases Cited by Petitioner are Distinguishable out of Hand, and Do Not Demonstrate the Existence of Any Conflicts.

Petitioner cites the decision *Lindros v. Fortuna*, 157 F.3d 945 (2nd Cir. 1998) as support to illustrate a heightened pleading standard requirement in the Seventh Circuit. *Lindros* supports Respondents by holding that it is "hornbook law that the party invoking federal jurisdiction bears the burden of proving facts to establish[] jurisdiction."

Petitioner also cites *Taylor v. Appleton*, 30 F.3d 1365 (11th Cir. 1994), as support of an alleged conflict between circuits. *Taylor*, however, states the same proposition of law set forth by the Seventh Circuit, namely, "[c]itizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity." *Taylor*, 30 F.3d at 1367.

3. Petitioner's Argument that the Seventh Circuit Did Not Consider Any of the Evidence Produced in Discovery Is Wrong.

Petitioner argues that the Court of Appeals "focused exclusively on the notice of removal . . . and did not consider evidence produced in discovery or memorandum subsequently submitted . . . which conclusively established that plaintiffs were

citizens of Illinois at all times." (Pet. at 11) (Emphasis in the original). Petitioner is wrong. A simple review of the argument and opinion belie this argument.

a. The Court of Appeals Allowed Petitioner to Amend Its Defective Notices of Removals based Upon Purported Facts Obtained During Discovery, Which Petitioner Refused to Do Until After the Remand was Ordered.

First, the Seventh Circuit invited Petitioner to file an amended notice of removal based upon evidence it obtained during discovery, which Petitioner refused to do for more than two months until after the Seventh Circuit ordered the case remanded. Then, after the case was ordered remanded to state court, Petitioner sought a rehearing *en banc* in which it presented an out of time amended notice of removal which included the deposition transcripts and interrogatory answers which Petitioner alleged demonstrates Plaintiffs' citizenship. The Seventh Circuit correctly struck the amended notice of removal as out of time and denied reconsideration.

Petitioner's belated attempt to file an amended notice of removal adding the missing allegation of diversity of citizenship is an acknowledgment by Petitioner that its original notices were defective. The amended notice was correctly stricken and reconsideration *en banc* appropriately was denied. Following *Stanley v. Kelly*, 758 F. Supp. 1487, 1488 (S.D. Fla. 1991) (a § 1653 amendment is not permitted after case remanded to state court), the amended notice of removal was out of time twice: first, after the Court of Appeals warned Petitioner that "we certainly don't have [jurisdiction] on the allegations in this record,"

Tylka v. Gerber, 211 F.3d 445 (7th Cir. 2000) (Pet. Appendix at 7a); and second, when Petitioner then waited an additional 12 days before attempting to file its amended notice of removal, after the court's decision was delivered.

There is no split among authorities on this issue. Federal courts "*universally*" construe this language to preclude appellate review not only of a remand order, but also reconsideration. *Stanley*, 758 F. Supp. at 1488 (emphasis added) (*citing Seedman v. United States District Court for the Central District of California*, 837 F.2d 413, 414 (9th Cir. 1988); *FDIC v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979); *Three J Farms, Inc. v. Alton Box Board Co.*, 609 F.2d 112, 115 (4th Cir. 1979), *cert. denied*, 445 U.S. 911, 100 S. Ct. 1090, 63 L. Ed. 2d 327 (1980); Wright, Miller, & Cooper, 14A Fed. Prac. & Proc. § 3739, at 588-89 (1990)).

b. The Seventh Circuit's Decision to Deny Petitioner's Amended Notice of Removal Was Within its Sound Discretion

In *Handy v. Uniroyal, Inc.*, 298 F. Supp. 301, 303 (D. Del. 1969), the court reviewed the legislative history of § 1653's predecessor statute. The legislative history states amendments by parties in the appellate court are "*upon such terms as the court may impose.*" *Citing*, Title 28 U.S.C., 1940, ed. § 399, Mar. 3, 1911, c. 231, § 274c, as added Mar. 3, 1915, c. 90, 38 Stat. 956. (Emphasis added). Section 1653 retains the "upon terms" language and should be similarly construed. Thus, when Petitioner feigns confusion for its own strategic choice and requests this Court's intervention, its argument fails since § 1653 has never specified a time to file amendments. Case

law does not specify a specific time. Based on the forcefulness of the Seventh Circuit's direction, it was surprising that Petitioner did not file a § 1653 amendment the very day of oral argument. In some cases, courts have directed counsel to amend within a specified time frame (*e.g. Kaufman v. Western Union Tele. Co.*, 224 F.2d 723 (5th Cir. 1955) (10 days) or *Fry v. Layne-Western Co.*, 282 F.2d 97 (8th Cir. 1960) (30 days)), but the Appellate Court *is not* required to do so. Regardless of the time given Petitioner, the Appellate Court's discretion to allow amendments is "*upon such terms as the court may impose*" was within the Appellate Court's discretion under § 1653.

4. Petitioner's Alleged Belated Evidence Does Not Establish Citizenship.

The Seventh Circuit could not have given any weight to the Petitioner's alleged evidence since Petitioner failed to demonstrate citizenship, as opposed to residency. Petitioner merely showed residency since the discovery transcripts reveal that not one plaintiff was asked at deposition or by written interrogatory to state their citizenship. Each was asked to state their "address" with "dates of residency." Likewise, Petitioner never requested an admission of citizenship.

III. The Seventh Circuit's Unanimous Decision Is Accurate, Correct, and in Accord with Other Decisions.

A. The Court of Appeals Was Correct.

Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996), recognizing the decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), stated that, "the judgment could not stand because the requisite diversity jurisdiction, it turned out, existed neither

at the time of removal nor at the time of judgment. . . . we held that the absence of federal jurisdiction at the time of judgement required the Court of Appeals to vacate the District Court judgment." *Caterpillar*, 519 U.S. at 70.

The decision of the Court of Appeals was correct and supported by ample citation to precedent where it ordered the parties to amend their pleading under § 1653, and dismissed cases where those parties had failed to timely amend:

> On a number of occasions we have dismissed actions where litigants fail to make section 1653 amendments to correct deficient allegations of diversity of citizenship after being instructed to do so. For example, during oral argument in *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1073 (7th Cir.1992), as in this case, "the court reminded the parties of the need to establish complete diversity of citizenship." But "[d]espite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends." *Id.* at 1074. Consequently, we vacated the district court's judgment on the merits and remanded with instructions to dismiss for lack of subject matter jurisdiction. *See id.; see also Guaranty*,101 F.3d at 59; *see, e.g., Held v. Held*, 137 F.3d 998, 1000 (7th Cir. 1998); *Dausch v. Ryske*, 9 F.3d 1244, 1245 (7th Cir. 1993); *Chicago Stadium Corp. v. State of Indiana*, 220 F.2d 797, 799 (7th Cir. 1955).

Tylka v. Gerber Products Co., 211 F.3d 445 (7th Cir. 2000). (Pet. Appendix at 6a).

The Seventh Circuit was correct to rely on *In re County Collector*, 96 F.3d 890 (7th Cir. 1996), for the proposition that it was duty bound to inquire into diversity of citizenship, and to satisfy itself of the existence of jurisdiction. This Court held, in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

The Supreme Court itself, as well as appellate courts, are under the obligation to examine their own jurisdiction. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990) (*citing*, *Allen v. Wright*, 468 U.S. 737 (1984) ("perhaps the most important of [the jurisdictional] doctrines.")). In *FW/PBS*, quoting *Wright*, the Court held that the appellate court has the obligation to satisfy itself of jurisdiction even if the parties are prepared to concede it. *FW/PBS*, 493 U.S. at 231. The scholarly journals are also in accord:

> A court is not required to conduct a searching inquiry into the truth of every uncontested jurisdictional allegation. . . . But if the judge has reason to believe that he lacks jurisdiction he is not obliged, and indeed is not permitted, to close his eyes and assume a jurisdiction that he doubts he has. It is also a well established rule that a challenge to the court's jurisdiction may be raised at any time during the litigation. When jurisdiction is challenged on a factual basis, the court is free to look at evidence outside the pleadings, including affidavits, depositions, testimony, documents, and other available extra-pleading material, or to conduct a limited

> evidentiary hearing, in determining whether it has jurisdiction.

Wright, Miller, Cooper, Fed. Prac. and Proc. § 3602, Jurisdiction and Related Matters, 2000 Pocket Part (West 2000).

In this case, the Seventh Circuit followed its previous holding in *Harris v. American Legion*, 162 F. Supp. 700 (S.D. Ind. 1958) at 261 F.2d 594 (7th Cir. 1958), *rehearing denied*, that where the appellants refused to amend their jurisdictional pleading as the District Court had invited them to do, they thereby "knowingly" acquiesced and then could not come to the Appellate Court "asking leave to do what they failed to do below . . .". *Harris* held that a

> plaintiff should not be denied the right to amend under Section 1653, 28 U.S.C., when jurisdiction is questioned either by the court or by a party to the action, yet when the court calls the plaintiff's attention to a defective allegation as to citizenship and affords the opportunity to amend, which is not done, and further invites the plaintiff to submit evidence showing jurisdiction at a separate hearing for that purpose, but no proof is submitted, the plaintiff's right to amend and submit proof has been exhausted under said section.

Harris, 162 F. Supp. at 712; Wright & Miller: Fed. Prac. & Proc. § 3611, The Requirement and Meaning of Citizenship-in General (1982).

The result in this case is consistent with the holding in *Harris*. The Court of Appeals called to Petitioner's attention

the defective allegations regarding citizenship and afforded Petitioner an extended window of opportunity to amend. This Petitioner failed to do. The Seventh Circuit invited Petitioner to submit its evidence showing jurisdiction found in discovery, as Petitioner at oral argument had said it could do, but Petitioner did not present that proof. Petitioner's right to amend under § 1653, thus, has been exhausted. *See Joy v. Hague*, 175 F.2d 395 (1st Cir 1949), *cert. denied*, 338 U.S. 870 (where plaintiff did not accept opportunity to supply missing allegation of jurisdictional amount, appellate court would not allow amendment of defective allegations of jurisdiction).

B. The Decision By the Seventh Circuit Was Fair.

The fairness of the decision is underscored by the fact that there is no change in the manner of practice regarding correction of faulty removals. Thus, Petitioner cites *Razdan v. General Motors Corp.*, 99-3012 (7th Cir. 1999), where the same counsel who represents Petitioner in this case, instead of ignoring the Court of Appeals's direction, chose to follow the court's direction and corrected a notice of removal. Petitioner's choice here to not follow the Court of Appeal's direction to amend its notice of removal further underscores that the facts of this case are peculiar and not likely to reoccur.

C. The Decision Below Is in Accord with the Federal Rules and the Local Rules of the Northern District of Illinois.

Petitioner claims that the Court of Appeals "sets a trap for unwary litigants." Petitioner is wrong.

This is a patent mischaracterization of the simple matter of amending the notices of removal — which Petitioner easily did, not after being told by the Seventh Circuit to do so, but only after the Seventh Circuit had ordered the remand. Petitioner characterizes its predicament as navigating through a "procedural Scylla and Charybdis." However, Petitioner's analogy is wrong. If modern day lawyers could even be likened to Odysseus, Petitioner has available to it the traditional "map" available to all lawyers practicing in the federal courts — the statutes and rule books. A practitioner will find that 28 U.S.C. § 1446(b) and Northern District of Illinois Local Rule 81.2 Removals; Remands of Removals (West 2000) (Formally Local Civil Rule 3) provide a map that contemplates simple discovery in this situation. For example, Petitioner could have made a simple request to admit citizenship (as distinguished from mere residence). 28 U.S.C. § 1446(b) states "[i]f the case stated by the initial pleading is not removable, a notice may be filed within thirty days after receipt by the defendant . . . of . . . *other paper* from which it may first be ascertained that the case is one which is or has become removable." (Emphasis added). Under the applicable local rule, "other papers" is understood by the committee comment as written discovery and requests for admission in context of § 1446(b). Thus, there is no dangerous "procedural Scylla and Charybdis." Practitioners routinely follow the rules of civil procedure, and Petitioner could have sent a request to admit citizenship without any risk of missing the deadline to file its removal.

IV. The District Court Did Not Acquire Jurisdiction After Petitioner's Fatally Defective Notices of Removal and Before the District Court Entered Summary Judgment

Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996), on which Petitioner relies, stands for the proposition that where jurisdiction does not exist at the time of removal but does exist at the time of trial, based on considerations of finality, efficiency and economy, the judgment at trial need not be set aside and vacated. However, unlike *Caterpillar*, Petitioner does not and cannot point to any intervening changes in facts that gave rise to federal diversity jurisdiction at the time the District Judge disregarded the finding of the Magistrate (who denied summary judgment) and granted summary judgment in favor of Petitioner. Unlike *Caterpillar*, where jurisdiction did exist at the time the District Court entered judgement, jurisdiction did not exist at the time the District Court incorrectly granted summary judgment. Indeed, as the Seventh Circuit found, jurisdiction *never* existed in this case. *Caterpillar*, thus, cannot serve as the basis to rescue Petitioner from its own fatally defective notices of removal.

The considerations of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), finality, efficiency and economy do not offset the complete absence of jurisdiction in this case and, in any event, are not persuasive for the following additional reasons: (1) the case was decided on a pre-trial summary judgement motion, not after trial; (2) the Magistrate Judge ruled in favor of the Plaintiffs on the merits on *the state cause of action* on summary judgment; (3) Petitioner is not denied its day in state court on a state law question for which the District Judge and Magistrate Judge did not agree on a question of summary judgment; (4) since the day this case was removed, Plaintiffs

fought federal jurisdiction — on two remand motions and as the sole basis for appellate review; (5) the years improperly spent litigating in the federal courts would not be wasted or duplicated. All of the discovery taken in the federal court would be preserved and usable in the state court. All that would be lost to Petitioner is the pre-trial summary judgment decision from the District Judge who overruled the Magistrate. Petitioner, of course, would be free to resubmit a motion for summary judgment to the state court where the matter should have been pending all along; and (6) Petitioner did not even attempt to cure its fatally defective notices of removal until after the Seventh Circuit ordered that the summary judgment be vacated and the case be remanded to state court.

Caterpillar holds that, "at the end of the day and case, a jurisdictional defect remains uncured the judgment must be vacated." *Caterpillar*, 519 U.S. at 77, *citing*, Fed. Rule Civ. Proc. 12(h)(3). As the Seventh Circuit explained, "[Petitioner] have only themselves to blame if they must now litigate this case from scratch in state court." *citing Guaranty*, 101 F.3d at 59.

V. Petitioner's Refusal to Correct Its Mistake is Not an Important Question That Merits Review.

The issue potentially raised by Petitioner is not sufficiently important to warrant this Court's attention. The decision below raises no issue of national importance. The question for review is whether Petitioner should be excused for disregarding the clear instruction of the Court of Appeals. Respondents respectfully submit that this question *is not* sufficiently important to merit review by the Supreme Court.

VI. The *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) Issue Raised Last Term in *Free v. Abbott Laboratories Inc.*, No. 99-391, Is Not Ripe For Review.

A. The Supreme Court Should Not Decide Issues Not Raised or Decided In the Court of Appeals

The *Zahn* issue raised last term in *Free v. Abbott*, 146 L. Ed. 2d 306 (2000), also is in this case though it was not reached by the Court of Appeals. In remanding this case to the state court, the Seventh Circuit stated:

> [b]ecause the basis for the resolution of this appeal lies in Gerber's failure to perfect subject matter jurisdiction as directed by the court, only the facts relevant to that issue will be addressed in this opinion . . .

Tylka v. Gerber, 211 F.3d 445 (7th Cir. 2000) (Pet. Appendix at 3a).

The questions raised by Plaintiff-Appellants-Respondents on appeal in the Seventh Circuit but not reached by the Court of Appeals are:

> I. Whether the District Court improperly aggregated the value of the requested injunctive relief to create diversity jurisdiction.
>
> II. Whether in applying supplemental jurisdiction, 28 U.S.C. §1367, to absent class members, the lower court improperly aggregated claims, in violation of the teachings of *Snyder v. Harris*, 394 U.S. 322 (1969), *Zahn v. International Paper Co.*, 414 U.S.

291 (1973) and *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997).

III. Whether the trial court incorrectly decided:

a) that plaintiffs' complaint was primarily a complaint for injunctive relief — and ignored that it was primarily a complaint for damages;

b) that the value of the injunctive relief requested in the complaint should be viewed from the defendant's perspective applied for injunctive relief; and

c) that when viewed from the defendant's perspective the request for injunctive relief met the $50,000 amount in controversy requirement.

IV. Whether the amount-in-controversy was satisfied by requests for attorneys fees and punitive damages.

V. Whether the District Court wrongly found diversity jurisdiction upon a request for injunctive relief that under Illinois law could not be granted and thus had no value whatsoever.

Respondents Appellate Brief at 2. Because these issues were not decided below, the *Zahn* issue is not ripe for review. Sup. Ct. R. 10. (2000).

Petitioner's matter of fact presumption that Respondents sought injunctive relief worth more than the jurisdictional amount is a fact that is contested and left unaddressed. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996), therefore, is irrelevant since there is no ruling below that any one plaintiff in this case satisfies the amount in controversy requirement.

Certiorari on the *Zahn* issue further is not appropriate, as Petitioner admits, because "the court of appeals did not expressly address the supplemental jurisdiction issue." (Pet. at 29). "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) *citing*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Accordingly, Petitioner's request for review of the *Zahn* issue should not even be reached and Petitioner's Petition for Writ of Certiorari should be denied.

Should the Court grant review of the Seventh Circuit's decision, the Court nonetheless should not grant review of the *Zahn* issue. Although raised in the Court of Appeals, the *Zahn* issue was not decided by the Seventh Circuit and is not ripe for review. The *Zahn* issue should be left for decision by the Seventh Circuit before this Court entertains the issue in this case — if that ever becomes necessary. Contrary to Petitioner's averment, there are issues to be raised and decide by the Seventh Circuit, which Respondent respectfully suggests will be decided in Respondents' favor, following the non-aggregation rule for computing the amount in controversy in class action cases. *In re Brand Name Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).

B. Respondent Is the True Petitioner on the *Zahn* Issue and Should Be Designated as Such If That Issue Is Reached.

Notwithstanding the foregoing, should the Court decide to reach the *Zahn* issue now, Respondents should be redesignated by the Court as petitioners on that issue. The Respondents in this case were removed from state court protesting removal under § 1367 aggregation in opposition to *Zahn*. Because the District Court ruled against Respondents and the Seventh Circuit did not address the issue, the standing decision on this appeal would be adverse to Respondent and they, not Petitioner, would be the true "petitioner."

CONCLUSION

Jurisdiction is lacking for review of the Seventh Circuit's remand order under 28 U.S.C. § 1447(d). However, should the Court conclude that it does have jurisdiction, Petitioner's Writ of Certiorari still should be denied. There is no conflict among circuits, no heightened pleading standard has been imposed by the Seventh Circuit, and Petitioner does not raise an important question of law. The factual question raised is peculiar and unlikely to be repeated (*see e.g. Razdan v. General Motors Corp.*, No. 99-3012 (7th Cir.) (the Petitioner's own counsel *in this very case* complied in that case with the court's direction of the court to file an amended Notice of removal under § 1653, *http:www.ca7.uscourts.gov/dkt.htm*, (last visited October 5, 2000)). Finally, the decision below was both fair and meritorious. Petitioner chose this path *after* being sternly warned of the consequences while being directed to its cure. Finally, the Seventh Circuit's opinion fully considered all of Petitioner's arguments in support of granting the Petition for Writ of Certiorari raised here.

Therefore, Respondents respectfully request this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED FEBRUARY 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 96 C 1647

PAMELA J. TYLKA, H. JOSHUA CHAET,
CHERYL KELLER, et al.,

Plaintiffs-Appellants,

VS.

GERBER PRODUCTS COMPANY,
a Michigan Corporation,

Defendant-Appellee.

TRANSCRIPTION OF THE TAPE RECORDED PROCEEDINGS had at the hearing in the above-entitled cause before the Honorable JOHN L. COFFEY, FRANK H. EASTERBROOK, and ANN CLAIRE WILLIAMS, Judges of said Court, commencing on the 22nd day of February, A.D., 2000.

* * *

[2] JUDGE EASTERBROOK: Number 6, please. Tylka versus Gerber. All right, Counsel.

MR. KRISLOV: Good morning, Judge Coffey, Judge Easterbrook, Judge Williams. I'm Clint Krislov. I'll argue the case on behalf of the Plaintiff-Appellants.

The issue in this case is whether a complaint — a class action complaint asserting purely state law consumer fraud claims in which the named plaintiffs have less than the jurisdictional amount in damages is changed into a federal diversity jurisdiction case by the mere request for injunctive relief. There are four points which I'd like to addre —

JUDGE EASTERBROOK: I hate to say this, but it looks to me like there's a jurisdictional problem independent of that which none of the parties have discussed. I can't tell that the parties are a diverse citizenship.

MR. KRISLOV: I believe the parties before the Court were all of diverse [3] citizenship, your Honor.

JUDGE EASTERBROOK: What in the record shows that?

MR. KRISLOV: Not anticip —

JUDGE EASTERBROOK: The complaints filed in state court all allege that one or another Plaintiff is a quote resident of Illinois.

MR. KRISLOV: Yes.

JUDGE EASTERBROOK: Which is not the —

MR. KRISLOV: The same —

JUDGE EASTERBROOK: — pertinent to the question of federal subject matter jurisdiction. That depends on citizenship which means domicile. And the Supreme Court of the United States has held repeatedly, as have we, that an allegation of residence is jurisdictionally insufficient.

Looks to me like these cases were removed from state court without proper allegations of jurisdiction — without proper allegations of diversity of citizenship —

MR. KRISLOV: Your Honor —

[4] JUDGE EASTERBROOK: — independent of the jurisdictional amount.

MR. KRISLOV: Your Honor, if the three of you would like to take a vote, I'll be glad to sit down and wait for the outcome, and we can all just go home and —

JUDGE EASTERBROOK: Of course your —

MR. KRISLOV: — send the case back.

JUDGE EASTERBROOK: — problem is that 28 USC 1653 permits the allegations of jurisdiction to be amended even in the Court of Appeals. So if it is possible truthfully to amend the allegations of jurisdiction to allege domicile as opposed to residence, then maybe there's diversity. But until that happens, we certainly don't have it on the allegations in this record.

MR. KRISLOV: Your Honor, I'll be glad to address that with my co-counsel while my opposition argues; and we will, if necessary, cure that if we are able to, which I suspect we will be.

* * *

[14]* * *

MR. WILHELM: [counsel for petitioner here] Your Honors, may it please the Court, Richard Wilhelm on behalf of the defendant and Appellee Gerber Products [15] Company.

My plan, your Honors, is to emphasize three points. The first is the point that I think has already been emphasized —

JUDGE EASTERBROOK: The first plan ought to be to talk about whether we have diversity of citizenship.

MR. WILHELM: Yes, your Honor. After removal when the —

JUDGE EASTERBROOK: The notices of removal Gerber filed are amazing. They say well, the complaint alleges that X is a resident of Illinois; therefore, X is a citizen of Illinois. That's just not true. It's a non sequitur.

The Supreme Court has — had the district court been alert, these cases would have been remanded in an hour, and

that would have been the end because you couldn't have appealed that remand.

MR. WILHELM: The fact that you raise — that you raise an issue about though has been confirmed in depositions where all [16] of the named Plaintiffs were deposed. All of them testified as to their state of domicile. All of them testified that they were — they were indeed citizens of the state of Illinois —

JUDGE EASTERBROOK: Well —

MR. WILHELM: — and there was no issue raised with respect to —

JUDGE EASTERBROOK: You then may be able to amend the complaints —

MR. WILHELM: Correct.

JUDGE EASTERBROOK: — under Section 1653.

MR. WILHELM: Correct.

JUDGE EASTERBROOK: And should count your lucky stars because this case should have been remanded instantly because these notices were transparently defective.

* * * *

FILED
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No. 00-387

IN THE

Supreme Court of the United States

GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA G. TYLKA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Chamber of Commerce of The United States of America ("Chamber") and the American Chemistry Council ("Council") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file a brief *Amici Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Amici* are filing this motion because Respondents have declined to consent to this brief being filed. A copy of the proposed brief is attached.

As more fully explained at page 1 of the attached brief under "Interest of the *Amici Curiae*", the Chamber and the Council are organizations representing business corporations and associations throughout the United States. The members of the Chamber and the Council will suffer the effects of the decision of the Seventh Circuit in this case if it is permitted to stand, because they are routinely made defendants in class actions filed in state courts throughout the country, and often seek to remove those cases to federal court.

Amici believes that their brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely positioned to point out: (1) that business corporations in this country need to have certainty about the standards governing removal of cases from state court; (2) that the Seventh Circuit's decision poses a significant threat that businesses will be exposed to wasteful litigation; and (3) that it is important to business that the question concerning the scope of 28 U.S.C. § 1367 be resolved.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *Amici Curiae*.

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I

INTEREST OF THE AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. The Chamber represents a membership of more than three million business and professional organizations from around the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The American Chemistry Council, (formerly, the Chemical Manufacturers Association) ("Council") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $435 billion dollar enterprise and a key element of the nation's economy. One of the functions of the Council is to file *amicus curiae* briefs in cases involving issues of importance to its members.

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1. Pursuant to Rule 37.6 *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. Petitioner has consented to the filing of this brief, but Respondents have not.

Members of the Chamber and the Council have been subjected to significant numbers of abusive class actions and other lawsuits filed in state courts on a regular basis. It has been the experience of the members that they are more likely to be afforded a full and fair hearing, and to be protected from abusive claims, particularly in the class action context, when those claims can be heard in federal court. For this reason, it is of critical importance to the members of the Chamber and the Council, and to American business, that they be permitted to invoke federal jurisdiction through removal whenever the statutory requirements for removal jurisdiction are met. Because the Petition in this case presents two important questions that bear on the rights of defendants to remove cases to federal court, the Chamber and the Council urge the Court to grant the Petition.

REASONS FOR GRANTING THE WRIT

Defendants hailed into court in a foreign state, and especially corporations sued in class actions in those states, have a legitimate interest in seeking to invoke the jurisdiction of the federal courts whenever that jurisdiction is available. The statutory provisions, governing rules and decided case law are rigorous and combine to make removal a difficult undertaking, but not to render it impossible. The governing standards allow a party seeking removal to know what it must do, how it must do it and when. The decision by the Seventh Circuit in this case takes away that certainty and erects nearly insurmountable obstacles on the basis of a clearly erroneous view of the requirements for removal.

The decision of the Seventh Circuit in this case has another pernicious effect. This case was litigated vigorously for four years and decided on the merits. The record amply

demonstrates that the District Court had subject matter jurisdiction. Nevertheless, through the mechanistic application of an erroneous finding that the removal was procedurally flawed, the Seventh Circuit ordered that the time, effort and expense borne by the District Court and the parties be disregarded and the case sent back to state court to start all over again. The Seventh Circuit's decision presents the threat that similar senseless waste will be imposed in numerous other cases.

Finally, this case affords the Court with an opportunity to decide whether 28 U.S.C. § 1367 authorizes the district courts, in adjudicating class actions based on diversity of citizenship, to exercise supplemental jurisdiction over the claims of absent class members that individually do not satisfy the jurisdictional minimum amount set by 28 U.S.C. § 1332, if the representative plaintiff's claim meets that amount. The Court sought to answer that question last term in *Free v. Abbott Laboratories, Inc.* 529 U.S. __, 120 S. Ct. 1578 (2000), in which the Court affirmed by an equally divided Court. For the reasons that led the Court to grant *certiorari* in *Free*, this Court should consider and decide that question in this case.

I. THE SEVENTH CIRCUIT'S ERRONEOUS DECISION PLACES IMPOSSIBLE BURDENS ON LITIGANTS SEEKING TO INVOKE FEDERAL COURT JURISDICTION

In ruling that Petitioner had not removed this case properly, and that as a consequence the case must be remanded to state court, the Seventh Circuit got it wrong and got it wrong in several important ways. Those points are covered cogently and comprehensively in the Petition filed by Gerber Products Company and will not be repeated

here. What the Chamber and the Council want to bring to the Court's attention is why this erroneous ruling poses a significant threat to their members and others in the American business community.

It is of critical importance to the American business community that businesses be permitted to avail themselves of the removal procedures prescribed by the relevant provisions of the United States Code, the Federal Rules of Civil Procedure and the decisions of this Court and the lower federal courts. From the earliest days, it has been recognized by this Court that the purpose of creating diversity jurisdiction in the federal courts was to protect a citizen of one state sued in the courts of another state from the actual and perceived unfairness to which such a defendant might be subjected. *See Bank of The United States v. Deveaux*, 9 U.S. (5 *Cranch*) 61, 87 (1809) (*Marshall,* C.J.). The passage of time has not lessened the need for such protection; indeed, in some respects the need has increased. Particularly in the context of so called "national class actions", and in consumer class actions like this case, corporate defendants have a real and legitimate interest in seeking the procedural safeguards and even-handedness provided by the federal court forum, but all too often not available in state courts.

The threatened harm to businesses caused by the Seventh Circuit's ruling has two distinct but related aspects. First, of course, is the simple threat that an out-of-state business entitled to remove a case will nonetheless be subject to the risk of local bias. The second threat may not be as evident but may be even more serious. It is often the case that state procedural rules simply do not provide the same safeguards as do the Federal Rules, especially in class actions.

The following discussion of some of the serious issues raised by class actions is not meant to comment on the appropriateness of class certification in this case, and is not included because those concerns about class actions are directly at issue in this case. Rather, the discussion is intended to illustrate why it is so important to the members of the Chamber and the Council that they not be deprived of their rights to remove state court cases, especially class actions, to the federal courts when the jurisdictional requirements are met.

There has been a growing recognition in the federal appellate courts, and in this Court, of some of the dangers posed by class action suits and the concomitant need to examine rigorously the propriety of certifying a class and to apply scrupulously the safeguards provided by Rule 23. Ironically, the Seventh Circuit has been in the forefront of this salutary trend.

One of the seminal decisions in this area is Chief Judge Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995). The Seventh Circuit granted the extraordinary relief of *mandamus*, ordering the district court to decertify a class because the challenged order of class certification would cause irreparable harm to the defendants, and because the district court's order was "usurpative". At issue in *Rhone-Poulenc* was an order that certified a class of hemophiliacs infected by the AIDS virus through exposure to contaminated blood products. Prior to the Seventh Circuit's decision, thirteen other cases seeking to impose tort liability on manufacturers for the transmission of HIV to hemophiliacs had been tried in various courts around the country and the defendants had won twelve of them. Chief Judge Posner pointed out the enormous risk faced by

defendants in cases of this sort where a class is certified, and the fact that certification itself often forces significant settlements despite a lack of validity to the plaintiffs' claim:

> But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. (citations omitted.) If they settle, the class certification — the ruling that will have forced them to settle — will never be reviewed. (citations omitted.) Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements" (citations omitted.) Judicial concern about them is legitimate, not "sociological" as it was derisively termed in *In re Sugar Antitrust Litigation*, 559 F. 2d. 481, 483, n.1 (9th Cir. 1977). 51 F. 3d. at 1298-1299.

More recently, in *Blair v. Equifax Check Services, Inc.*, 181 F. 3d. 832 (7th Cir. 1999), Judge Easterbrook expressed similar concerns:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. (Citing *Rhone-Poulenc, supra*) 181 F. 3d. at 834.

The Seventh Circuit has not been alone in this concern. In *Castano v. American Tobacco Company*, 84 F.3d 734, 746 (5th Cir. 1996), the Fifth Circuit stated:

> In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens a number of unmeritorious claims. (cite omitted.)

Federal courts reviewing class certifications have pointed to the difficulties presented when a single court is asked to apply the law of multiple jurisdictions, or else to create a "hybrid" of the law of negligence, strict liability, etc. The courts in *Rhone-Poulenc* and *Castano* noted that these difficulties alone militated against certifying such class actions; Judge Posner noted the danger that such a situation would eventuate in "a single jury instructed in accordance with no actual law of any jurisdiction — a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the fifty states and the District of Columbia," 51 F.3d at 1300. The Sixth Circuit in *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) granted a writ of mandamus and ordered that the district court decertify a class, noting that "if more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be appropriate course of action," *Id.* at 1085.

In *Amchem Product, Inc. v. Windsor*, 521 U.S. 591 (1997), this Court affirmed a Third Circuit decision striking down a $1.3 billion class settlement of future asbestos claims. The Court expressed serious reservations about the use of

class actions in mass tort cases, emphasizing the fact that differences in state law compounded the disparities among putative class members. Referring to the 1966 Notes of the Rules Advisory Committee questioning the wisdom of the use of the class action mechanism in such cases, the Court stated that "the Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members are great," *Id.* at 625.

None of this is intended to argue or advance the proposition that class actions are inappropriate or always without merit. In fact, Judge Posner explicitly noted in *Rhone-Poulenc*:

> We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. *We have yet to consider the balance.* (emphasis added).

51 F.3d 1293, 1299.

That is precisely the point as to why the Seventh Circuit's action in denying Gerber's right to remove this case is so harmful. This Court in *Amchem Products,* the Seventh Circuit in *Rhone-Poulenc* and *Blair*, the Fifth Circuit in *Castano*, the Sixth Circuit in *American Medical Systems*, and numerous other federal courts routinely engage in that balancing and that scrutiny to determine whether or not the use of a class action is appropriate. The federal courts weigh the claimed justifications for and benefits of class treatment,

against the disparities, deficiencies and inequities that class treatment might provide. Unfortunately, the same protections and the same rigorous scrutiny are often lacking in some state courts, and that is why the ability to remove cases, in appropriate circumstances, is so important to America's business community.[2]

Corporate defendants' experience in state court class actions is often strikingly different from what is experienced in federal courts. To be sure, many state courts and state court systems make significant efforts to provide the same types of procedural safeguards to parties in class actions. It is no secret, however, that certain state court systems, and particular counties within those states, have been identified

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2. Significantly, the federal system has recently made interlocutory appellate review even more readily available in the context of class action determinations. Other than *Blair*, each of the cases discussed above (*Amchem, Rhone-Poulenc, Castano* and *American Medical Systems*) obtained appellate review only through a writ of mandamus in the Courts of Appeals. Obviously, only the extraordinary case gets the benefit of the issuance of a writ of mandamus. By amendment which took effect on December 1, 1998, however, FRCP Rule 23(f) was added to the class action rule, to permit a Court of Appeals in its discretion to hear an appeal from an order of a district court granting or denying class certification. As Judge Easterbrook noted in *Blair*:

> [W]hen the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order. 185 F.3d at 835.

Most often, interlocutory review of class certification orders is not available in state court. *See*, for example, 75 ILCS 5/2-801, *et seq.* (Illinois.)

as hospitable, welcoming hunting grounds for plaintiffs' lawyers eager to file consumer and mass tort class actions. *See*, for example, the report of the RAND Institute for Civil Justice, *Class Action Dilemmas,* Executive Summary p.7 (1999). The Wall Street Journal has reported that plaintiffs' class action lawyers seek out rural courts in Louisiana, Tennessee, Alabama and elsewhere, filing a disproportionate number of class actions in courts perceived to be friendly to plaintiffs and hostile to the business community. Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall Street Journal, October 10, 1996 at B.1.

Illinois has recently emerged as one of the most popular states for the filing of consumer class actions, especially in two southern Illinois counties. This comes in the wake of one Illinois court's decision to certify a class action encompassing 4.7 million members located in 48 different states. *Avery v. State Farm Mutual Auto Ins. Co.*, No. 97-L-114 (currently on appeal to Illinois Appellate Court, Fifth District.) The court certified the class despite the fact that two federal courts and one state court in another Illinois county had earlier refused to certify similar classes. *See Moorhead v. State Farm Mutual Auto Insurance Company*, No. 95-AR-0668-S (N.D. Ala. September 12, 1997); *Murray v. State Farm Mutual Auto Insurance Company*, No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Insurance Company*, No. 94 CH11396 (Cook County Cir. Ct. Jan. 27, 1998). In a series of rulings that essentially ignored the very real concerns addressed by the federal courts in the cases discussed above, the trial court eventually upheld class certification and conducted a trial that resulted in enormous damages. Not surprisingly, since then numerous class actions have been brought in two

counties in this part of Illinois, purporting to be on behalf of multi-state classes and often against out-of-state defendants.[3]

What does all of this say about the Seventh Circuit's decision in *Tylka v. Gerber Products Company*? More to the point, what does the Seventh Circuit's decision say about the very real concerns presented by class actions? What it says is that corporate defendants can be forced to face the very serious hazards described by the Seventh Circuit itself in *Rhone-Poulenc* and *Blair*, by the Fifth Circuit in *Castano* and by the Sixth Circuit in *American Medical Systems*, without any of the protections and rigorous scrutiny afforded by the federal courts and by the Federal Rules of Civil Procedure.

The decision also means that a defendant seeking to obtain those safeguards may find itself precluded from doing so, no matter how carefully it proceeds. In this case:

- *Gerber alleged in its removal papers that each of the plaintiffs was a citizen of Illinois, that Gerber was a citizen of Michigan, and that complete diversity of citizenship existed.*

- *The District Court found that diversity of citizenship existed.*

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3. For a description of the class certification phase of this case, *see* Petition for Writ of Certiorari, No. 97-2063, *State Farm Mutual Insurance Company v. Speroni*, (filed June 22, 1998). For a more complete description of the history of class action filings in these Illinois venues in the last two years, see Brief for the Chamber of Commerce of the United States of America and the Chemical Manufacturers Association, filed as Amicus Curiae in *Free v. Abbott Laboratories*, No. 99-391, February 11, 2000.

- *The plaintiffs admitted in submissions to the District Court and to the Seventh Circuit that they were citizens of Illinois and that diversity of citizenship existed.*

- *The fact of the plaintiffs' citizenship was established at deposition.*

All of this was made known to the Seventh Circuit, and still it was not enough. If for some reason the Seventh Circuit was still not satisfied, it could have sent the case back to the district court to confirm that these jurisdictional facts had been established. It did not do so. Instead, the Seventh Circuit decided after four years of litigation and judgment on the merits that the entire proceedings were for naught, because notices of removal filed four years earlier somehow did not contain as yet unspecified magic words.

This result means that, like Gerber, any corporate defendant sued in a foreign state, with complete diversity, and with all of the other prerequisites for federal court jurisdiction present, might nonetheless be forced to litigate in hostile state courts. It would be bad enough if this were an isolated incident, but it does not stop there. On June 22 of this year, the Seventh Circuit issued an order in *Razdan v. General Motors Corporation*, No. 99-3012. Like this case, *Razdan* was filed in state court and removed to the United States District Court for the Northern District of Illinois on the basis of diversity of citizenship. Like this case, *Razdan* was litigated on the merits, and defendant obtained summary judgment. The Seventh Circuit's June 22, 2000 order reads, in full, as follows:

> This case was removed to the federal district court on the basis of diversity of citizenship. See 28 U.S.C. § 1441(a). The court has reviewed

> the record and discovered a problem with subject matter jurisdiction. Although the defendant's notice of removal states that the plaintiff is a citizen of the State of Illinois, the plaintiff's complaint alleges that he is a resident of Illinois. The record does not reveal whether diversity of citizenship existed at the time of removal. Accordingly, the court, on its own motion, will allow counsel for the parties 10 days to amend their pleadings to establish the basis for federal diversity jurisdiction. See 28 U.S.C. §1653, *Tylka v. Gerber Products Co.*, 211 F.3d 445, 447 (7th Cir. 2000). The parties' submissions must be filed by July 7, 2000, or the judgment of the district court will be vacated and the case remanded to the district court with instructions to remand the case to the state court.

This is extraordinary. The requirements of 28 U.S.C. § 1446(a) appear to be clear enough: any defendant wishing to remove a case to federal court is required to file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal . . ." Of course, pursuant to 28 U.S.C. § 1446(b), that notice of removal must be filed within thirty days of service of the complaint. Despite the fact that defendant's notice of removal in *Razdan* states that the ground for removal was that plaintiff was a citizen of the State of Illinois, the Seventh Circuit found this inadequate because *plaintiff's complaint* alleged that he was a resident of Illinois. The court went on to threaten that, as in this case, years of litigation effort and a judgment on the merits would be tossed out the window unless the parties could submit some unspecified, additional information "to establish the basis for federal diversity jurisdiction."

As noted in the Petition (p. 12-17), both Rule 8(a)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1446 make it plain that "notice pleading" is all that is required for removal. As Petitioner also points out, "federal law presumes that an individual's residence is also his domicile." (Petition, at 16 and cases cited therein.) In short, the statute and rules do not require, and the realities of litigation do not permit a defendant seeking to remove a case to do more in the way of giving a "short and plain statement of the grounds for removal" than was done by Gerber here, or by General Motors in *Razdan*. Almost inevitably, in state court filings, a plaintiff identifies his or her place of residence, not citizenship. But given the fact that residence, domicile and citizenship are, in most cases, the same, it is entirely consistent with the obligations of Rule 11 and the requirements of § 1446(a) for a defendant advised of a plaintiff's residence, and required to file a notice of removal within thirty days of service of the complaint before any discovery is likely to have taken place, to assert in good faith that plaintiff is a citizen of the state in which he or she resides. And, as noted in the Petition, courts have routinely taken such averments of diversity at face value and found them acceptable. *See* Petition at page 15.

The Seventh Circuit's decision in this case is very instructive for the plaintiffs' class action bar. It tells them that if they want to stay in state court, and if they want to avoid the careful scrutiny brought to bear on class actions by the federal courts, they should carefully avoid any reference to citizenship in the allegations of their complaint. It also instructs them that they ought to use any available procedural mechanism to avoid providing discovery in the first thirty days following service of the complaint.

And what does the decision here tell defendants like Gerber or any other business entity sued in state court? It tells them that, at least if they are in the Seventh Circuit, they may be deprived of their right to litigate claims in federal court even when there is diversity of citizenship, and subject matter jurisdiction, and a timely filed notice of removal. It tells them that they can try to remove a case, and litigate it to a conclusion, and perhaps prevail on the merits, and have that taken away from them.

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), this Court looked at another removal issue, viz., when the thirty day period for filing a notice of removal begins to run under 28 U.S.C. § 1446(b). The Court rejected any interpretation of the removal statute and the Federal Rules that would permit a plaintiff to "trap foreign opponents into keeping their suits in state courts." *Id.* It also rejected any interpretation of the removal statute that would permit a party's procedural rights to "slip away". *Id.* But that is exactly what would eventuate if the Seventh Circuit's decision is left undisturbed. The Court should grant the Petition to make clear that defendants seeking removal will not have to suffer the dire consequences wrought by the Seventh Circuit's decision.

II. TO SEND THIS CASE BACK TO STATE COURT WOULD BE A MISCARRIAGE OF JUSTICE

Petitioner forcefully and persuasively explains how the decision of the Seventh Circuit in this case is in direct conflict with and defies a recent decision of this court, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). *See*, Petition pp. 22-26. Nothing needs to be added to that discussion, except to note that the Chamber and the Council agree that the ruling in *Caterpillar* requires that the Seventh Circuit decision in this case be

summarily reversed. The Chamber and the Council do wish to comment briefly, however, on the devastating effect that a decision such as that rendered by the Seventh Circuit in this case, and rejected by *Caterpillar,* can have on their members.

What happened here should not be allowed. Both Petitioner and Respondents spent four years, countless hours, substantial effort and, no doubt, staggering amounts of money in litigating this case. Issue was joined, discovery was completed, motions were filed, briefed, and decided; at the end of the day, the district court decided the case on its merits. There was no finding by the Seventh Circuit that the district court lacked subject matter jurisdiction. There was no finding of some fundamental flaw in the proceedings. There was only the erroneous determination that there was a mechanical flaw in an early procedural filing. On that flimsy basis, all of that time, all of that effort, all of that money and, worst of all, all of that expenditure of judicial resources were rendered meaningless. As if that were not bad enough, if the Seventh Circuit's decision stands, *all of that has to be done again in the state court, from scratch.*

Nor is such folly limited to this case. The Seventh Circuit has threatened to do the very same thing in *Razdan v. General Motors, supra* — another case fully litigated and decided on the merits. How many other cases, how many other parties face the possibility of such an insidious result if the Seventh Circuit's decision here stands? According to statistics compiled by the Administrative Office of the U.S. Courts, approximately 175,000 cases were removed from state courts to United States district courts between 1994 and 1998, the most recent statistics available. In 1996 alone, the year in which *Tylka* was filed, some 40,593 cases were removed. *See* Administrative Office of the U.S. Courts, *Judicial Business Of The United States Courts*, 1999, Table S-7.

It is not unreasonable to assume that many of those cases are still being litigated, and that some have been decided on the merits and are now awaiting appellate review. It is also not unreasonable to assume that, in many of those 175,000 cases, the "short and plain statement" of the grounds for removal contained language very similar to that included in the notices of removal filed by Petitioner in this case. If even a small fraction of those cases face the prospect of receiving the same "justice" meted out by the Seventh Circuit in this case, the result will be intolerable. Such a result would do more than defy the ruling of this Court in *Caterpillar*; it would defy common sense. The Chamber and the Council urge this Court to grant *certiorari* to set aside the Seventh Circuit's ruling.

III. THE ISSUE CONCERNING THE SCOPE OF SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367 NEEDS TO BE RESOLVED, AND THIS CASE PRESENTS AN APPROPRIATE VEHICLE BY WHICH TO RESOLVE IT

The Chamber and the Council and their members have a strong interest in having the Court resolve the question presented last term in *Free v. Abbott Laboratories, Inc.*, No. 99-391. In that case, the Court attempted to answer whether 28 U.S.C. § 1367 authorizes the district courts, in adjudicating class actions based on diversity of citizenship, to exercise supplemental jurisdiction over the claims of absent class members that individually do not satisfy the jurisdictional minimums. Because the Court split four to four on the questions presented in *Free*, with one Justice not participating, the question was left unanswered. This case presents the question squarely and cleanly, since this juridictional minimums issue, and not diversity of

citizenship, was the basis of respondents' appeal. Because the Court should in any event grant *certiorari* to address the other issues discussed above, the Court can and should resolve this question as well.

The Chamber and the Council (then known as the Chemical Manufacturers Association) filed a brief as *amici curiae* in *Free v. Abbott Laboratories*, and the Chamber and the Council stand by all of the arguments set forth therein. The members of the Chamber and of the Council have a strong interest in having this question resolved for many of the same reasons discussed above in connection with the issues concerning the adequacy of the notice of removal. The same underlying question — whether defendants will be able to avail themselves of the benefits of federal court jurisdiction in class actions — is implicated here. The Chamber and the Council believe that the plain language of 28 U.S.C. § 1367 authorizes the federal district courts to exercise supplemental jurisdiction over absent class members, regardless of the amounts of their claims, so long as the court has original jurisdiction over the claims of the representative class members. There is a split in the Circuits on that issue, however, and its resolution is clearly of substantial importance, as the Court recognized in granting *certiorari* in *Free v. Abbott Laboratories*. Accordingly, the Court should again take up that question as it is presented in this case.

CONCLUSION

The questions presented by the Petition for Writ of Certiorari are questions of great importance to the American business community. *Amici curiae* the Chamber of Commerce of The United States of America and the American Chemistry Council urge the Court to grant the Petition and to set the case for briefing and argument.

Respectfully submitted,

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GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA JEAN TYLKA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

In their Brief in Opposition, respondents do not deny that they were and are in fact *citizens* of Illinois, as Gerber had alleged in its removal notices, and, therefore, that diversity jurisdiction actually existed at all relevant times. Indeed, respondents admitted their Illinois citizenship in both the district court and court of appeals. Rather, they try to defend the Seventh Circuit's ruling that Gerber's averment of this jurisdictional element did not satisfy the heightened standard of pleading the court erroneously applied.

Gerber had averred:

> "According to the allegations of the Complaint, Plaintiff is an individual who resides in Illinois. Thus, Plaintiff is a citizen of Illinois for jurisdictional purposes." (App. 62a).

Respondents strain to demonstrate that the reference to residence in *addition* to citizenship and the use of the word "thus" are of critical importance, distinguishing Gerber's averments from those allegations that this Court has previously upheld as sufficient. But respondents' efforts simply underscore Gerber's point that the Seventh Circuit, in concluding that these allegations of diverse "citizenship" were insufficient as a matter of federal pleading law, has elevated form over substance and unjustifiably adopted a heightened pleading requirement for removal notices. Respondents admit that the Seventh Circuit is applying this test in other cases.

Moreover, respondents offer little in response to our showing that this Court's decision in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), required the Seventh Circuit to uphold the district court's judgment, even if the initial notices of removal were formally defective, so long as the record actually showed diversity of citizenship. They do not deny that the district court found as a fact that diversity existed. Respondents trivialize the *Caterpillar* interests in finality and judicial economy, suggesting that they do not apply because the Article III district

judge entered judgment in favor of Gerber on the merits, even though the Article I magistrate would have denied Gerber's motion for summary judgment. If ever there was a "non sequitur," that is it.

Finally, respondents' efforts to minimize the importance of this case are belied by the brief *amici curiae* filed on behalf of the U.S. Chamber of Commerce and the American Chemistry Council. That brief carefully and concretely explains the broad significance of the Seventh Circuit's decision for other litigants seeking to exercise their constitutional and statutory rights to remove cases to a federal forum, especially large "consumer class actions" filed against out-of-state corporate defendants. This case provides the Court with the opportunity to clarify the permissible scope of removal of class claims and the appropriate procedure for ascertaining and averring diversity jurisdiction.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION OF THE COURT OF APPEALS.

Respondents contend that 28 U.S.C. § 1447(d) bars this Court from granting the petition, claiming that Congress made the Seventh Circuit's decision unreviewable. Respondents raised this same objection in opposing Gerber's application for a stay of the Seventh Circuit's mandate, contending that a stay would be inappropriate because this Court lacked jurisdiction to review the decision below. See Respondents' Opposition to Petitioner's Application for Stay at 6. Justice Stevens, however, granted the stay, implicitly rejecting that argument. Justice Stevens was undoubtedly correct in assuming that the Court possesses jurisdiction to grant certiorari.

This Court has repeatedly held that the statutory bar on appellate review of remand orders applies only to remand orders entered by the district court and does not apply to court of appeals rulings *reversing* the *denial* of a motion to remand.

Aetna Cas. & Surety Co. v. *Flowers*, 330 U.S. 464, 466-467 (1947); *Gay* v. *Ruff*, 292 U.S. 25, 30-31 (1934).

Respondents contend that Congress overruled *Flowers* and *Gay* in 1948 by altering the statute's original text — "no appeal or writ of error from the decision of the district court so remanding shall be allowed" — and substituting the current formulation: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise * * * ." As this Court has previously held, however, this change in language was not intended to have a substantive effect but rather was merely the by-product of Congress's recodification of the Judicial Code in 1948. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 349-350 & n.15 (1976) ("Sections 1447(c) and (d) represent the 1948 recodification of §§ 71 and 80. They were intended to *restate* the prior law with respect to remand orders and their reviewability.") (emphasis added).

Similarly, the authoritative commentators on federal jurisdiction agree that the change in language was not intended to divest this Court of its jurisdiction to review court of appeals decisions reversing the *denial* of motions to remand. See 16 MOORE'S FEDERAL PRACTICE 3D § 107App.113[2][a], at 107App.-198 (2000); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURIS 2D § 3740, at 549 (1998).

Not surprisingly, therefore, the decisions cited by respondents do not hold to the contrary. Indeed, every single decision cited by respondents involved *a district court* order *remanding* the case to state court. See *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 & n.2 (1995); *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723, 723 (1977) (*per curiam*). So too, *Volvo of America Corp.* v. *Schwarzer*, 429 U.S. 1331 (1976), a decision by then-Justice Rehnquist acting as Circuit Justice, presented the question whether to stay a decision by the *district court* remanding a suit to state court so

that the defendant could appeal *to the court of appeals*, but that is precisely the kind of order that Section 1447(d) does make non-reviewable.

In fact, in numerous cases since the statutory amendment this Court has reviewed decisions by the court of appeals remanding a case to state court. That includes a unanimous decision just four years ago. *E.g.*, *Caterpillar*, 519 U.S. at 66-67; *Willingham* v. *Morgan*, 395 U.S. 402, 404 (1969). In none of those cases did even one member of the Court suggest that § 1447(d) barred this Court's review. That consistent practice conclusively establishes jurisdiction here.

II. THE SEVENTH CIRCUIT'S DECISION THAT GERBER'S ORIGINAL NOTICES OF REMOVAL WERE DEFECTIVE WARRANTS REVIEW.

Respondents contend that the Seventh Circuit correctly decided that Gerber's notices of removal inadequately pled respondents' Illinois citizenship. According to respondents, Gerber's express allegation that "Plaintiff is a citizen of Illinois for jurisdictional purposes" was defective because it was preceded by and linked to an averment of their acknowledged Illinois residency. For that reason, respondents contend (at 10) that Gerber's allegation is "absolutely materially distinguishable" from the one this Court upheld in *Kinney* v. *Columbia Savings & Loan Ass'n*, 191 U.S. 78, 79 (1903), which read: "complainants herein are citizens and residents of Salt Lake City, state of Utah."

Far from showing why this Court should let the Seventh Circuit persist in its approach, respondents' arguments demonstrate the need for this Court's review. Gerber unambiguously alleged respondents' citizenship. (App 62a). The critical question (which respondents side-step and which this Court should resolve) is whether that allegation is sufficient when it is tied to the plaintiffs' own averment regarding their residence. Respondents cite no decision resolving that question

in their favor. Indeed, *Kinney*, the only decision of this Court they discuss in this regard, upheld the sufficiency of an allegation virtually identical to Gerber's. Moreover, respondents offer no response to our point that it is quite reasonable for a defendant sued by an individual to assume (and, therefore, to allege in a notice of removal) that the individual is a citizen of the State in which she resides.

Nor is there any merit to respondents' insistence that the Seventh Circuit did not adopt a heightened pleading requirement. The Seventh Circuit concluded that Gerber's allegation of respondents' Illinois ***citizenship*** was insufficient because it was tied to an allegation of respondents' Illinois ***residency***. That decision makes sense *if and only if* one believes (as the Seventh Circuit evidently does) that (1) the removal statute and the Federal Rules require a defendant to plead specific facts underlying its belief in the plaintiff's "citizenship;" and (2) it is unreasonable to infer, at the pleading stage, that a person's admitted residence is her domicile. That, of course, is nothing less than a heightened pleading requirement. Furthermore, as we explained in the Petition, each of these two predicates for the Seventh Circuit's approach in this case (and others cited in the Petition and in the U.S. Chamber of Commerce *amici* brief) flies directly in the face of the removal statute and Federal Civil Rule 8.

Lastly, respondents assert that there is no conflict among the circuits, because all of the circuits agree that an allegation of residency is insufficient for pleading purposes. Respondents, however, mischaracterize the question presented. No one disputes that citizenship, not residency, is the key to federal diversity jurisdiction. But the critical question here is whether an express allegation of citizenship premised upon the party's residence is insufficient. The Seventh Circuit stands alone among the circuits in holding that such an allegation fails to satisfy federal law and that federal law requires something more

than a bare allegation of citizenship.[1] Indeed, Respondents fail to identify even one decision from another circuit condemning an allegation similar to Gerber's.

III. THE SEVENTH CIRCUIT'S DECISION TO DISREGARD THE TRIAL COURT'S FINDING OF DIVERSE CITIZENSHIP AND TO REVERSE A JUDGMENT RENDERED ON THE MERITS AFTER FOUR YEARS OF LITIGATION JUSTIFIES SUMMARY REVERSAL.

In our Petition, we explained that the Seventh Circuit's decision conflicts directly with decisions of this Court and other circuits, which hold that a reviewing court cannot content itself simply with a survey of the pleadings but must also consider any evidence in the record bearing upon the existence of subject matter jurisdiction. In response, respondents argue (at 14-16) that (1) the Seventh Circuit invited Gerber to amend its notices of removal to conform to the evidence and (2) the evidence establishes only respondents' residence, not their citizenship.

Respondents' initial argument sails wide of the mark both factually and legally. The Seventh Circuit never ordered Gerber to do anything. Indeed, respondents conveniently side-step the salient fact that no written order was ever issued. True, at oral argument Judge Easterbrook questioned Gerber's counsel about

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[1] Respondents suggest (at 13) that the Seventh Circuit's decision does not conflict with *Lindros* v. *Fortuna*, 157 F.3d 945 (2d Cir. 1998), and *Taylor* v. *Appleton*, 30 F.3d 1365 (11th Cir. 1994). They ignore the fact that those circuits, along with *Lew* v. *Moss*, 797 F.2d 747, 748 (9th Cir. 1986),which we also cited for illustration, endorsed as sufficient for pleading purposes allegations of citizenship far more conclusory than Gerber's. See *Lindros*, 157 F.3d at 946 (plaintiff "is a citizen of the State of Florida"); *Taylor*, 30 F.3d at 1367 ("Taylor's complaint alleges that he is a citizen of Florida * * * .").

the removal notices, but even he did not expressly direct Gerber to file an amended notice. It would be highly undesirable to establish a rule that places upon parties the burden to amend pleadings whenever one member of a panel questions counsel at oral argument about a possible defect in the pleadings.

More fundamentally, respondent's argument misses the point as a legal matter. Gerber was under no obligation to file amended notices of removal in the first place. As we explained, Rule 15(b) required the Seventh Circuit to treat the original notices of removal as conformed to the evidence presented. As this Court insisted in *Caterpillar*, a reviewing court cannot dismiss for lack of jurisdiction because of a pleading defect, if the evidentiary record actually reveals the existence of the jurisdictional facts. Thus, to require Gerber to amend the removal notices when the case was already at the appellate level would have been both a pointless formality and a waste of time and money – which is ***precisely*** why this Court, every other court of appeals, and Rule 15(b) dispense with such a requirement.

Respondents' alternative argument is that the evidence did not establish their citizenship. This is a gross distortion of the record. Respondents neglect to mention the district court's express finding that the parties are of diverse citizenship (App. 18a). They also ignore their own explicit concession in their Seventh Circuit brief that they are Illinois citizens. Moreover, respondents conceded in their deposition testimony and interrogatory answers that they resided in Illinois at the time they brought suit, that they had lived there for many years before that, and that some of them had been born in Illinois and had never resided outside the state. In the absence of any evidence that their *domicile* was different from their residence – and respondents offered none – that evidence was sufficient as a matter of law to establish that respondents were citizens of Illinois, as the district court found. *E.g.*, *Gutierrez* v. *Fox*, 141 F.3d 425, 428-429 (2d Cir. 1998) (evidence that plaintiff resides

in New Jersey sufficient to establish his New Jersey citizenship for diversity purposes). Indeed, even now, respondents do not contend otherwise.

Most importantly, respondents fail to come to grips with this Court's decision in *Caterpillar*, which foreclosed the Seventh Circuit from vacating a judgment rendered on the merits after four years of litigation because of a mere pleading error in the original notices of removal. Respondents contend (at 16-20) that, despite *Caterpillar*, the Seventh Circuit was empowered to reverse the judgment in Gerber's favor as a sanction for Gerber's (alleged) failure to comply with the Court's directive to file an amended notice of removal pursuant to 28 U.S.C. § 1653. As noted above, however, Gerber did not disregard any express direction by the court of appeals. Moreover, the Seventh Circuit did not try to justify its decision as a "sanction" for failing to comply with some kind of directive to amend the notices. Rather, the court rested its decision on its patently erroneous belief that (1) the notices were defective and (2) the alleged pleading defect allowed the court to ignore the actual existence of diversity as shown by the record.

Moreover, Respondents misapprehend the purpose of Section 1653. That provision is not a sword designed to penalize litigants for failing to correct deficient pleadings; rather, it is a shield whose avowed purpose is to avoid the precise result that occurred here. Indeed, in light of this Court's decision in *Caterpillar*, reversal and remand to the state courts for relitigation would not be a permissible sanction for a mere pleading error in the original notice of removal.

So too, there is no merit in respondents's related argument (at 22-23) that *Caterpillar* does not apply here, because subject matter jurisdiction was lacking at the time the district court entered judgment. As noted above, the district court expressly found that the parties were diverse, and the respondents

themselves conceded this fact in their brief to the Seventh Circuit. Thus, not only did subject matter jurisdiction exist when judgment was entered, it has always existed in this case.

IV. THIS COURT SHOULD RESOLVE THE SUPPLEMENTAL JURISDICTION ISSUE LEFT OPEN LAST TERM IN *FREE* v. *ABBOTT LABORATORIES, INC.*, 529 U.S. ___ (2000).

Respondents acknowledge that the effect of the recent "supplemental jurisdiction" statute on this Court's decision in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), is a cert-worthy issue and that the Court sought to decide it last Term in *Free*. They also admit (at 24) that the "*Zahn* issue" is "in this case." Indeed, it was the principal focus of respondents' appeal to the Seventh Circuit. Respondents even suggest (at 27) that, if the Court grants certiorari, they should be viewed as "the true 'petitioner'" on this issue.

Nevertheless, they contend (at 26) that this case is a poor vehicle in which to resolve the issue. They argue that, using what they believe are the correct legal inquiries, *none* of the named plaintiffs asserted a claim worth more than $50,000. The district court, however, resolved that preliminary question against them, concluding that, in calculating the jurisdictional amount "in controversy," the court could consider the defendant's cost of complying with injunctive relief sought as well as its potential liability for attorneys fees. The court also determined that the cost of the injunctive relief, which approximated $1 million, could be attributed to any one of the named plaintiffs and that, therefore, there was at least one plaintiff whose claim satisfied the jurisdictional minimum. (App. 17a).

The district court's conclusions on these points are sound. But in any event, these issues are inextricably bound up with *Zahn* and the supplemental jurisdiction issue. These subsidiary issues about what factors may be considered in calculating the

jurisdictional amount are part of the existing circuit conflict. Thus, their resolution is subsumed within the questions presented by the Petition.

Respondents also contend (at 24-25) that the "*Zahn* issue" is not ripe for review, because the Seventh Circuit did not expressly address it in the decision below. But the issue is nevertheless "ripe" in this case, because it is essential to the validity of the judgment against respondents and was expressly litigated below. Moreover, as we explained in the Petition, there is nothing to be gained by deferring the resolution of this legal issue so as to permit the Seventh Circuit to address it expressly in this case. In an earlier decision, the Seventh Circuit already aligned itself with the Fifth Circuit and concluded that Congress's passage of 28 U.S.C. § 1367 did overrule this Court's decision in *Zahn*. See *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 930-931 (7th Cir. 1996). The district court's judgment rests on that approach.

Finally, it is important to the administration of civil justice throughout the country that this Court resolve the issue as soon as possible. The *Zahn* issue continues to divide the lower courts. See, *e.g.*, *Morrison* v. *Allstate Indem. Co.*, ___ F.3d ___, 2000 WL 1392456, at *18 (11th Cir. Sept. 26, 2000) (noting the continuing circuit split on this issue and remanding to district court for further proceedings). Moreover, this case presents the first-available opportunity to resolve the matter. Indeed, if the Court declines to consider this issue now in this case, it may not be able to address this issue later on as part of an appeal from a final judgment of the Illinois Supreme Court, and no other case appears ready for this Court's review. Thus, along with the diversity/removal issue, this supplemental jurisdiction issue is squarely framed and obviously important.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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